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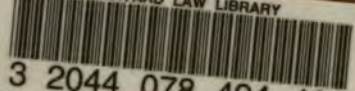
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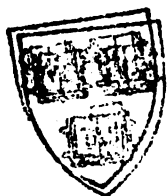


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# INDIANA REPORTS.

VOL. XII.







Indiana. Supreme court

REPORTS <sup>cf</sup>

OF

CASES ARGUED AND DETERMINED

IN THE

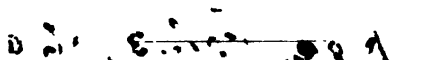
SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,



WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

  
BY GORDON TANNER,  
OFFICIAL REPORTER.

VOL. XII

CONTAINING THE CASES DECIDED AT THE MAY TERM, 1859, EXCEPT  
CERTAIN CASES HELD BACK ON PETITIONS FOR REHEARING.

MERRILL & COMPANY:  
INDIANAPOLIS, IND.  
1859.



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Entered according to an Act of Congress, in the year one thousand eight hundred and fifty-nine, by

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*Rec. Feb. 3. 1860*  
*2/3/1860*

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J U D G E S  
O F T H E  
S U P R E M E C O U R T O F J U D I C A T U R E  
O F T H E  
S T A T E O F I N D I A N A ,  
D U R I N G T H E P E R I O D C O M P R I S E D I N T H I S V O L U M E .

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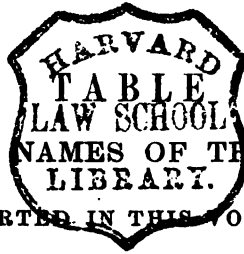
SAMUEL E. PERKINS,  
ANDREW DAVISON,  
JAMES L. WORDEN,  
JAMES M. HANNA.

Judge PERKINS was Chief Justice at the *May* term, 1859.



**FOR previous decisions of the Supreme Court of this State, overruled in this volume, see INDEX, tit. CASES OVERRULED, &c.**





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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1859, IN THE FORTY-THIRD  
YEAR OF THE STATE.

---

NAVE v. NAVE and Others.\*

Where a cause was not tried by a jury, and hence no question of law was raised by instructions or a special verdict, and the Court was not asked to state a case presenting the questions of law, the Supreme Court will not examine the questions of fact, but the judgment will be affirmed as in an ordinary appeal upon the weight of conflicting evidence.

*It seems* that points of law raised during the trial of a cause, should be treated as waived, unless they were again brought under review in the Court below by the written reasons upon a motion for a new trial.

APPEAL from the *Fountain* Circuit Court.

*Wednesday,  
January 5,  
1859.*

PERKINS, J.—This was a bill in chancery filed under the old, but heard under the new system of practice. The object of the bill was to settle partnership accounts of long standing, great variety, and large amounts. Commissioners examined and reported upon them; evidence was also

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\*A petition for a rehearing of this case was filed on the 18th of February, and overruled on the 28th of the same month.



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heard by the Court, the cause was taken under advisement for six months, and afterwards a final judgment was rendered awarding an amount to each partner. The plaintiff appeals to this Court. The record and written brief of the plaintiff's counsel, make two hundred and fifty closely written pages of foolscap.

The questions of law which might arise, are not separated from the facts in the case, but an inquiry into them involves the necessity of examining all the evidence. The cause was not tried by a jury; hence, no questions of law are raised by instructions, nor by a special verdict; and the Court was not asked to state a case presenting the questions of law decided. Under such circumstances, this Court will not go into an examination of the questions of fact—the province of the commissioners and jury, or Court below sitting as a jury, will not be invaded, and the judgment will be affirmed as in an ordinary appeal upon the weight of conflicting evidence.

Again: There was no motion, accompanied by written reasons, for a new trial; hence, no motion that the Court could notice. And it would seem to have been the intent of the legislature, in enacting the new code, that points of law raised during the trial of a cause, should be treated as waived, unless they were again brought under review before the Court below, upon a specification in writing, on a motion for a new trial. The statute (2 R. S. p. 119) provides that the motion for a new trial must be based "upon written cause filed at the time," &c.; and (same volume, p. 117) that a new trial may be granted, among other causes, for "error of law occurring at the trial, and excepted to by the party making the application."

The rule would be a reasonable one, that the Court below should have an opportunity, after the hurry of the trial was over, to hear full argument, and consult authorities upon disputed points ruled during its progress, and to correct any error it might conclude it had committed. It might prevent an appeal, in many instances, to this Court, or a reversal, where an appeal was taken.

The practice of this Court has not been, as above indi-



cated it might properly be. The point, however, has never been fully considered, and is not here decided.

*Per Curiam*.—The judgment is affirmed with costs.

*H. W. Chase* and *J. A. Wilstach*, for the appellant.

*R. A. Chandler*, for the appellees.

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ALBANY, &C.,  
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THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
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Service of process upon a conductor of a railroad train is sufficient to compel the appearance of the company.

In the enactment of the statute touching animals running at large (1 R. S. p. 102), the legislature contemplated the promotion of agricultural interests rather than the protection of railroad property.

The statute regulating the fencing of railroads (Acts of 1853, p. 113), is in the nature of a police regulation, by which railroad companies are required to fence their roads, or to hold themselves liable, to a certain extent, for animals injured for the want of such fences. It is not so much a measure of protection to the owners of such animals, as it is a regulation for the safety of passengers; and the legislature possesses the power to incorporate such a provision in a charter or general law authorizing the formation of companies; and, looking to the protection of human life, such a regulation may be prescribed, as in this case, after the road has been constructed, even where the company's charter is not amendable, without interfering with vested rights, or violating a contract.

APPEAL from the *Pulaski* Circuit Court.

Monday,  
May 23.

HANNA, J.—This was an action commenced before a justice of the peace by *Tilton*, to recover of the appellant the value of a mare, alleged to have been killed by the locomotive, &c., of said company.

There was a recovery of 100 dollars before the justice, and also for the same amount in the Circuit Court upon appeal.

There is no allegation in the pleadings of negligence; nor was there any evidence upon the trial upon that point; nor was there any evidence of any order, under the statute, of the county authorities, in relation to the kind of animals that should be permitted to run at large.



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The suit was evidently instituted under the act of *March* 1, 1853, copied at large in *The Madison, &c., Co. v. White-neck*, 8 Ind. R. 218.

The main point argued in this case is, as to whether the act referred to is constitutional.

Before proceeding to the examination of that question, we will dispose of some others that are raised and argued, although heretofore either directly or indirectly decided.

*First.* It is insisted that the service of a notice of the day of trial on a conductor of a train, was not such service as should compel the appearance of the defendant, although the statute expressly provides therefor.

In addition to the reasons given in *The New Albany, &c., Co. v. Grooms*, 9 Ind. R. 243, sustaining such service, we might say, that the policy of our system of jurisprudence requires that the party to be affected directly by a judgment, should, in some form, have notice of the pendency of proceedings in a Court of justice, which might ultimately result in such a judgment. Where the proceedings are against a natural person, the best mode, and therefore the one that should be adopted where it can be, keeping the ends of justice to both parties in view, is, by personal service; but as to one of those impalpable and imperceptible bodies, known as artificial persons, or bodies corporate, such a rule cannot prevail; for a service upon a director, an officer, or an agent of such an institution, could not, in point of fact, be said to be a service upon the person sued—the artificial person before then created by the law. The power that created and breathed into being such a person, ought to, and in our opinion does, possess the right to prescribe the mode of bringing such persons to the bar of judgment.

*Second.* That proof ought to have been made by the plaintiff that the animal, for the killing of which suit was brought, was such an one as, by order of the board of commissioners of that county, was permitted to go at large. 1 R. S. p. 102.

The most that can be said in reference to the necessity of such an order and the proof thereof is, that domestic



animals which are, in the absence of such order, permitted by their owner to pass off his premises on to the premises of another, or on to a public or private way—in a word, to run at large—are trespassers. Whether such a position is correct or not, we shall not examine, for the reason that, in our view, such proposition might be conceded, and yet the company would be liable in the case at bar.

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In the argument, this question is treated as one affecting the rights of the parties to this suit alone. This is too circumscribed a view of the intention of the law-making power in the enactment of the statutes regulating the fencing of railroads, and in reference to animals running at large. It is clear from the context of the latter statute, that the legislature, by its enactment, was looking more to agricultural interests than to the protection of railroad property.

The former statute is, in our opinion, in the nature of a police regulation. By its terms, railroad companies are required to fence their roads, or hold themselves liable, to a certain extent, for animals injured for the want of such fences. The legislature certainly possessed the power to incorporate such a provision in a charter, or in a general law authorizing the formation of companies. Such power has been heretofore exercised and sustained in *New York Laws of 1850, p. 233.—Corwin v. The New York, &c. Railroad Co., 3 Kernan, 42.*

Here, our legislature did not incorporate the regulation in the charter of the appellants, but, after the construction of the road, attempted to prescribe it. It is insisted that by the act additional and heavy burdens are attempted to be fastened upon the company; that it is in reality an alteration of the charter, when it was provided in the original charter that no alteration should be made, &c. (*Local Laws of 1848, p. 456*); in a word, that the act is unconstitutional, because it interferes with vested rights, and impairs the obligations of a contract. It is assumed that the act of the legislature granting to the appellants certain franchises, and the acceptance of the act and exercise of the franchises by the company, are a contract.



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We shall not stop to inquire into the rights, or rather to limit our inquiry into the rights and remedies which exist as between the company and the owner of an animal that might chance to be injured on the road, or the power of the legislature to prescribe rules in reference thereto, if his rights were alone involved. The stockholders of a railroad company may have large amounts vested in the enterprise, and those who avail themselves of that mode of transporting property, from point to point, might likewise risk large amounts in value aboard the cars of such company. Whilst the business of the company should be confined to the transportation of property alone, the power of the legislature to impose new and additional burdens regulating such manner of transportation may be, in our opinion, in some instances questioned, where no serious question could arise as to the exercise of that power if the company should undertake to transport passengers. This arises out of the fact that the preservation of the life and limb of the citizen is, by the law, regarded as of more consequence than the protection of his property. When power is granted to organizations to prepare ways for carrying passengers from point to point, with great celerity, but by the application of a propelling agent of known danger and almost irresistible force, it would appear but reasonable that a right should be lodged somewhere to maintain over such organizations a supervisory control, by which they might be compelled, under penalties, to adopt approved means, when discovered, of lessening the great danger arising from the use of such agent and mode of conveyance. Such would be a police regulation—a regulation for the protection of the public. It is but the application of the principle that he who possesses a right shall exercise it in a manner the least detrimental, injurious, or dangerous to his neighbor. The penalty under the regulation, in the case at bar, is the payment to the owner of the value of the animal killed. It is, in that respect, better calculated to accomplish the desired end, than a fine paid to the public might be. To the company it is the same, whether the individual or the public should receive



that amount; but to others it is different; the reception by the owner, of the value of his property, is intended to prevent heart-burnings and disputes, and to check the outburst of angry passions, in a form that might be disastrous to human life, by the perpetration of malicious mischief to the work itself. See *The Madison, &c., Co. v. White-neck*, 8 Ind. R. 230; *Corwin v. The New York, &c., Co.*, 3 Kern. 42; *Fawcett v. The York, &c., Railway Co.*, 2 Eng. L. and E. 289; *The Jeffersonville, &c., Co. v. Applegate*, 10 Ind. R. 49.

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By the first and second sections of the act of congress of 1847, the number of passengers to be taken on board certain vessels to be carried to or from the *United States*, is fixed in proportion to the space to be occupied. As a penalty for a violation of the law, the master of the vessel is subject to a fine of 50 dollars for each passenger over, &c.; and if the excess is more than twenty, the vessel to be forfeited to the *United States*.

In the case of *The United States v. The Brig Neurea*, 19 How. 95, it is said that "the object of the act in question is the protection of the health and lives of passengers from becoming a prey to the avarice of ship owners." There is no intimation that the act is invalid, but to the reverse, the information was sustained. If we are correct, the object of this statute is, among other things, to prevent the lives of passengers from becoming a prey to the avarice of railroad owners.

By the act of congress of July 7, 1838, entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," it is declared that, "It shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of 200 dollars." This act has been held, in all its provisions, obligatory upon the owners and masters of steamers navigating the waters of the *United States*, &c. *Waring v. Clarke*, 5 How. 465.

Thus it is seen that the right of the individual citizen to



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engage in the business of carrying passengers to or from ports of the *United States*, and upon the waters of the *United States*, in boats propelled by steam, is restrained and regulated by statutes. Suppose, in the first cases cited, owners had vested large sums in the construction of vessels, destined to the business of carrying passengers, before the passage of the statutes, and that thereby the number that might otherwise have been conveyed, and the profits that might have accrued, were reduced one-third. Would not such enactment have been as much an infringement of individual rights—as much an interference with legitimate business—as could arise under the enactment now in question. In point of fact it would be, and the only reason, we conceive, that can be even plausibly urged, to strike down the one enactment while the other is sustained, would be upon the ground that the legislature, by the enactment authorizing the construction of the road, divested itself, and all future bodies of like character, of the power to make regulations to insure the safety of passengers upon such road.

One of the “unalienable rights” of man is the “pursuit of happiness,” included in which, as generally understood, is the right to acquire and quietly enjoy property. Yet by these acts of congress, this unalienable right to acquire property is, to a certain extent, infringed; the right of the individual is treated as secondary and subordinate to the general welfare.

If the legislative body possesses the power to regulate the enjoyment, by the citizen, of an unalienable right, we cannot well conceive how such body could grant to a few of the citizens of the state, when organized into a body politic, rights of a higher dignity or more sacred character than those generally recognized as unalienable.

Viewing in this light the questions involved in the case at bar, we are, we repeat, clearly of opinion that the statute should be considered as a police regulation, and, as such, is valid and binding upon all railroads, whether constructed under charters granted before or after its publication.



*Per Curiam.*—The judgment is affirmed with costs.

*W. G. Cooper*, for the appellants (1).

*D. D. Pratt*, for the appellees.

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(1) Counsel for the appellants, upon the principal question discussed in the opinion of the Court, cited the following authorities :

It may be urged, that the legislature has undoubted police jurisdiction over all corporations of their creating. This may in a measure be, and probably in some cases is, true; but it depends upon circumstances how far this power extends. They have, of course, the power to dictate the most exacting terms to the party asking to be incorporated, and, if they accept, are bound by them; but, in order to alter or modify these terms after their acceptance, who can doubt, for one moment, but what it would be necessary for the state to first obtain the consent of the other party before the alteration? or else it would not be binding upon private corporations, because their charters are contracts. *Parsons on Contracts*, 514. That the charters of private corporations, of which bank, insurance, turnpike, and railroad companies, are the leading instances, are contracts protected by the tenth section of the constitution of the *United States*, seems to be well settled. 2 *Story on the Const.* 1393.—2 *Kent's Comm.* 272.—*Angell and Ames on Corp.* chap. 1, § 31. The main distinction between public and private corporations is, that, over the former, the legislature, as the trustee or guardian of the public interests, has the exclusive and unrestrained control; and, acting as such, as it may create, so may it destroy or modify, as public exigency requires or recommends, or the public interest will be best subserved. The right to establish, alter, or abolish such corporations seems to be a principle inherent in the very nature of the institutions themselves; since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. Such institutions are the auxiliaries of the government in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature; because there can be no reciprocity of stipulation, and because their objects and duties are incompatible with everything of the nature of compact.

Private corporations, on the other hand, are created by an act of the legislature, which, in connection with its acceptance, is regarded as a compact, and one which, so long as the body corporate faithfully observes, the legislature is constitutionally restrained from impairing, by annexing new terms and conditions, onerous in their operation, or inconsistent with a reasonable construction of their contract. *Bailey v. The Mayor, &c., of New York*, 3 *Hill*, 531.—*State of Ohio v. The Library Co.*, 11 *Ohio R.* 96.—*Marietta v. Fearing*, 4 *id.* 427.—*Washington Bridge Co. v. The State*, 18 *Conn. R.* 53.—*Young v. Harrison*, 6 *Georg. R.* 130.—*County of Richmond v. County of Lawrence*, 12 *Ill. R.* 1.—*The President, &c., v. ———*, 13 *Sm. and Marsh.* 130.—*Hope v. Deadrich*, 8 *Humph. (Tenn.)* 1. Thus it has been expressly held that the legislature has no power to direct that any portion of the debts due a bank shall be received in anything but gold or silver, as it impairs the contract created by the act of incorporation *Bush v. Shipman*, 4 *Scam. (Ill.)* 190; and see *McKim v. Octom*, 3 *Bland. (Md. Ch.)* 417. Private corporations are indisputably the creatures of public policy, and, in the popular meaning of the term,



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may be called public; but yet, if the whole interest does not belong to the government (as if the corporation is created for the administration of civil or municipal power), the corporation is private. A bank, for instance, may be created by the government for its own uses; but, if the stock is owned by private persons, it is a private corporation, although it is erected by the sanction of public authority, and its objects and operations partake of a public nature. *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. (U. S.) 904. — *Miners' Bank v. The United States*, 1 Greene (Iowa), 558. "Generally speaking," say the Court, in the case of *The Bonaparte and Camden, &c., Railroad Company*, "public corporations are towns, cities, counties, parishes, existing for public purposes: private corporations are banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals; but their use may be public." 1 Bald. (Cir. Court) 222. In all the last-named and other like corporations, the acts done by them are done with a view to their own interests; and, if they thereby incidentally promote that of the public, it cannot reasonably be supposed they do it from any spirit of liberality they have beyond that of their fellow-citizens. Both the property and the sole object of every such corporation are essentially private; and, from them, the individuals composing the company corporate are to derive profit. *Ten Eyck v. The Delaware and Raritan Canal Co.*, 3 Harr. (N. J.) 200.—*R. and G. Railroad Co. v. Davis*, Dev. and Bat. (N. C.) 451. A private corporation, whether civil or eleemosynary, is a contract between the government and the corporators; and the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter. 2 Kent's Comm. 306.—Angell and Ames on Corp., § 767.—2 Story on the Const., § 1393.

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The act of March 1, 1853 (Acts, p. 113), providing compensation to the owners of animals killed or injured by the cars, &c., of railroad companies, is more for the benefit of the public—to guard against injury to passengers—than for the benefit of the owner of the animal.

Thus, such owner might be passively a wrongdoer, by suffering his animal to run at large, and yet recover.

Hence, the company cannot divest itself of responsibility by making private contracts with the landholders along their road, by which the latter separately agree to make and keep up fences.

Monday,  
May 23.

APPEAL from the *Lawrence* Circuit Court.

HANNA, J.—This was a suit for an animal killed by the cars of the company. Judgment for the plaintiff.



The objections to the judgment all fall within the reasoning of the case of the same appellant *v. Tilton*, decided at this term; and all of the points herein raised are directly decided in that case, with the exception of one. That point is presented upon the attempt which was made to show that a claim had been preferred by the plaintiff for damages for the construction of the road through his lands, included in which claim was the necessity of making additional fences.

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The evidence does not show directly that the animal was killed on the same land upon which damages had been assessed, nor does it show the payment of such assessment. But passing over that, we are of opinion, as indicated in the case above referred to, that the statute is more for the benefit of the public—to guard against injury to the citizen—than it is for the protection or benefit of the owner of the animal. Indeed, the owner of the animal might be passively a wrongdoer, by suffering his animal to run at large, and yet recover. The law does not prescribe the payment, by the road to the owner, of the value of the animal, because of his abstract right to that sum where he is thus a wrongdoer, but because it is supposed to be as effectual a mode as any that can as yet be devised to compel the exercise, by the road, of all reasonable care to insure the safety of passengers, included in which, is the adoption of such means as will prevent the cars from coming in collision with animate objects, involving not alone the destruction of such object, but most likely a great loss of human life, followed in many cases by angry, and sometimes malicious passions, engendered by the destruction of such property, and which might lead to further serious disaster, unless the value thereof is accounted for to the owner.

In this view of the statute, the road could not divest itself of responsibility by making private contracts with the numerous landholders along its route, by which they should separately agree and bind themselves to make and keep up fences. See authorities referred to in *The New Albany and Salem Railroad Co. v. Tilton*, at this term (1).



<p>May Term, 1859.</p> <hr/> <p>BOOE v. CALDWELL.</p>	<p><i>Per Curiam</i>.—The judgment is affirmed with 5 per cent. damages and costs.</p> <p><i>W. G. Cooper</i>, for the appellants.</p> <p><i>J. Baker</i>, for the appellee.</p>
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(1) The next precoding case.

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BOOE v. CALDWELL and Another.

Where *A.* and *B.* held themselves out as partners in a certain business, and *C.* contracted with *A.* to sell and deliver an article within the scope of that business, understanding that he was dealing with the firm; *held*, that *A.* and *B.* were both liable on the contract, though they might not, in fact, have been in partnership, and though *A.* did not intend, in making the contract, to pledge the credit of the firm, but only his own individual credit.

It must affirmatively appear, in such case, that the sale was made on the individual credit of the party purchasing, and on his own account.

*Monday,*  
*May 23.*

APPEAL from the *Fayette* Circuit Court.

Action by the appellant against *Caldwell* and *Watson*, to recover the value of one hundred and forty-eight bushels of wheat alleged to have been sold and delivered by the plaintiff to the defendants, as partners. Process not being served on *Watson*, the cause was continued as to him, for service, and *Caldwell* answered—

1. By general denial.

2. That although he and *Watson* were partners in trade at the time specified, the wheat was not purchased by the firm, but that it was sold and delivered by the plaintiff to *Watson*, on his own account and for his own use, and not for that of the firm of *Watson* and *Caldwell*.

Replication in denial of the matter set up in the answer.

Trial by jury; verdict and judgment for defendant, over a motion for a new trial.

It appears by a bill of exceptions, that on the trial of the



cause, it was agreed between the parties that, at the time of the sale and delivery of the wheat, the relation between *Caldwell* and *Watson* and the public was such, that *Watson* had power and authority to purchase on the credit of *Caldwell* and *Watson*, and that if the wheat was so purchased, *Caldwell* was liable to the plaintiff in this suit for the price of it. By agreement, the plaintiff and defendant were both to be received as competent witnesses, their credibility to be left to the jury.

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Plaintiff testified to the sale and delivery of the wheat. He made the contract of sale with *Watson*. Did not remember whether *Watson* said he was buying it for himself or for *Caldwell* and himself; but it was his understanding that he was selling it to both, and on their joint credit.

After making the contract for the sale of the wheat, he took a load to *Harrisburg*, and went into the store of *Caldwell* and *Watson*, and told *Caldwell* he had brought them a load of wheat. *Caldwell* was busy waiting on his customers, and told plaintiff that he could not attend to receiving it, but perhaps Mr. *Watt*, across the way, would attend to it. Plaintiff went to see Mr. *Watt*, but could not find him or any one else to receive the wheat; so he hauled it back, a distance of about one hundred and fifty rods. The wheat, it appears, was afterwards delivered. This was in the fall of 1856. The plaintiff gave in evidence the following card, published on the first day of *August* of that year, in a newspaper of general circulation in the county, viz.:

"Wheat! Wheat! *Watson* and *Caldwell*, *Harrisburg*, *Ind.*, are prepared to purchase, and will pay the very highest price in cash for, all the good wheat in eastern *Indiana*. We are purchasing for a *Cincinnati* firm, and are anxious to buy. We want the wheat delivered either at *Connersville*, *Harrisburg*, *Milton*, or *Cambridge*. July 30, 1856."

*Caldwell* was sworn, and testified that he had no interest in any of the wheat purchased by *Watson* in the fall of 1856—had no interest in that purchased of the plaintiff—was in partnership with *Watson* in the store, but had no interest in the purchases of grain. When the plaintiff



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came to the store and said he brought the load of wheat (as testified to by plaintiff), defendant informed plaintiff that he, defendant, "had nothing to do with the wheat." Booe then asked him if *Watson* did not have some one to attend to it for him. Defendant told him he had a Mr. *Thomas* engaged in that service, but he was absent, and that perhaps Mr. *Watt*, over the way, would attend to it. Booe heard what defendant said when he told him he had nothing to do with the wheat, and asked if *Watson* did not have some one to attend to it for him. The defendant proved by a witness, that in *September* or *October*, 1856, at *Harrisburg*, in a conversation between plaintiff and *Watson*, the plaintiff told *Watson* that he had brought a load of wheat to *Harrisburg*, and that there was no one to receive it; that he had called on *Caldwell* to receive it, and he would not do it. *Watson* asked plaintiff why *Caldwell* would not attend to the receiving of the wheat, and he replied that he was engaged in the store. *Watson* observed that *Caldwell* might have received it; that he had done as much for him; that he (*Caldwell*) had no interest in the wheat. *Watson* told plaintiff to bring on his wheat, that he wanted it and would pay the *Connersville* price for it.

The defendant introduced other testimony tending to show that he was not, in point of fact, interested in the business of purchasing wheat.

The plaintiff was again introduced, and testified that at times he was hard of hearing, and that if ever *Watson* or *Caldwell* told him that *Caldwell* had nothing to do with the wheat, he did not hear it, but, on the contrary, it was his understanding that he sold it to both defendants.

This is the substance of all the evidence in the cause.

The Court instructed the jury "that to entitle the plaintiff to recover, it was not only necessary that he should have understood that he was selling the wheat to both defendants, but such must have been the mutual understanding of both of the contracting parties. The plaintiff must have understood that he was selling his wheat to both of the defendants, and *Watson*, with whom the contract appears to have been made, must also have understood



that he was pledging the credit of them both for the payment."

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Thereupon the plaintiff requested the Court to charge that, "in the absence of any direct evidence as to whether *Watson* intended to buy the wheat on his own individual account and credit, or on the account and credit of *Watson* and *Caldwell*, it ought to be presumed that he purchased it on the account and credit of them both." This the Court refused, but charged "that it was for the jury to say, from all the evidence in the case, whether *Watson* intended to pledge his own individual credit, or the credit of both of the defendants."

To the charges given, and the refusal to charge as asked, the plaintiff excepted.

From the evidence offered, and the agreement of the parties, it is apparent that *Caldwell* was at least a nominal partner with *Watson* in the business of purchasing wheat. They were partners "in the store," and held themselves out as such in the business of purchasing wheat, by their advertisement, printed and circulated under such circumstances as to give general publicity to the same. Indeed, the agreement of the parties, that the relations of *Watson* and *Caldwell* were such that, as between themselves and the world, *Watson* had power to purchase on the credit of *Watson* and *Caldwell*, assumes that in that respect they were at least nominally in partnership.

Admitting that *Caldwell* had no interest in the purchases of wheat, and that, as between himself and *Watson*, they were not, in fact, in partnership, yet *Caldwell* having allowed his name to be held out to the world as that of a partner, the law imposes upon him the liability of one, to persons who have had dealings with the firm of which he has held himself out as a member. *Waugh v. Carver*, 1 Smith's Lead. Cases, 717, and note. "If he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the



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apparent credit of three or four persons, when, in fact, they lent it to two of them only, to whom, without the others, they would have lent nothing." Story on Part. 97.

The defendants, *Caldwell* and *Watson*, being nominally partners in the business of purchasing wheat, the question arises whether *Caldwell* is bound by such purchase, where the seller understands and supposes he is selling to the firm, although *Watson*, the member of the firm making the purchase, did not intend to pledge the credit of the firm, but only his own individual credit.

We think that, under such circumstances, both members of the firm are bound.

It is said by Chancellor KENT (3 Kent's Comm. 44), that "a sale to one partner in a case within the scope and course of the partnership business, is, in judgment of law, a sale to the partnership."

A very strong case illustrative of the above doctrine is that of *Bond v. Gibson and Jephson*, 1 Camp. 185. The case was assumpsit for goods sold and delivered.

It appeared that while the defendants were carrying on the trade of harness-makers together, *Jephson* bought of the plaintiff a great number of bits to be made up into bridles, which he carried away himself; but instead of taking them to the shop of himself and partner, he pawned them to raise money for his own use.

It was contended that this could not be considered a partnership debt, as the goods had not been bought on the partnership account, and the credit appeared to have been given to *Jephson* only.

But per LORD ELLENBOROUGH: "Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purpose they may be applied. I will take it that *Jephson* here meant to cheat his partner; still the seller is not on that account to suffer, and he had a right to suppose that this individual acted for the partnership."

Applying the law as thus expounded, to the case at bar, it follows that the Court erred in charging the jury that it was not only necessary that the plaintiff should have un-



derstood that he was selling to both defendants, in order to entitle him to recover, but such must have been the mutual understanding of both contracting parties; that *Watson* must have understood that he was pledging the credit of both for payment.

The rule, that a sale to one partner, in a case within the scope and course of the partnership, is, in judgment of law, a sale to the partnership, we think, applies where it does not affirmatively appear that the sale was made on the individual credit of the party purchasing, and on his own individual account, which does not appear to have been the case here. From the evidence it is entirely uncertain whether, in the contract for the sale of the wheat, there was anything said as to whether *Watson* was buying for himself individually, or for the firm; and in that state of uncertainty, the above rule, we think, is applicable.

As the jury might, on the evidence, have found differently, had they not been directed that in order to entitle the plaintiff to recover it was necessary that *Watson* should have understood that he was pledging the credit of the firm for the wheat, the judgment must be reversed.

By the charge given, the attention of the jury may have been withdrawn from what appears to have been the main question involved in the case; that is, whether the plaintiff had notice that *Caldwell* was not interested in, and had nothing to do with, the business of purchasing grain, before the sale or delivery of the wheat in question.

*Per Curiam*.—The judgment is reversed with costs, Cause remanded for a new trial.

*B. F. Claypool*, for the appellant (1).

*J. S. Reid* and *S. Heron*, for the appellees (2).

(1) Counsel for the appellant cited Story on Part., §§ 104, 105, 112, 134, 135, 140, 141; 1 Greenl. Ev., § 207; 2 McLean, 347; *Winship v. The United States Bank*, 5 Pet. 560.

(2) Counsel for the appellees cited Story on Part., §§ 137, 138, 154; *Port v. Williams*, 6 Ind. R. 219.



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LOVELL v. THE STATE.

LOVELL  
v.  
THE STATE.

As a general rule, evidence should not be given, either in criminal or civil cases, which does not directly tend to the proof or disproof of the matter in issue.

Under this rule, the facts given to the jury in a criminal case should consist exclusively of the transaction which forms the subject of the indictment.

Hence, the prosecution cannot prove another distinct offense for the purpose of raising an inference that the accused is guilty of the offense charged.

Thus, where the indictment contained a single charge of incest, which was proved as laid, the state cannot prove that the defendant had sexual intercourse with the prosecuting witness at any subsequent time.

Monday,  
May 23.

APPEAL from the *Hendricks* Circuit Court.

DAVISON, J.—This was a prosecution for incest. The indictment charges that the defendant, on the 10th of *December*, 1856, at *Hendricks* county, did, then and there, have sexual intercourse with one *Sarah E. Curtis*, his step-daughter, he, defendant, then and there well knowing, &c. Plea, not guilty. Verdict for the state, upon which the Court, having refused a new trial, rendered judgment, &c.

The record contains a bill of exceptions, which shows that upon the trial *Sarah E. Curtis* was produced, and testified that on the first of *December*, 1856, she was engaged in weaving, when the defendant, her step-father, came into the room, pulled her off the loom, threw her on the bed, and had sexual intercourse with her. At this point in her testimony, the prosecution asked the witness whether the defendant had had sexual intercourse with her at any subsequent time. To the question thus propounded, the defendant objected, alleging as his ground of objection, that one offense only was charged in the indictment, and the state having located the offense charged on the first *Monday* of *December*, had no right to prove another similar offense at a different time. But the objection was overruled, and the witness proceeded: "Defendant had sexual intercourse with me afterwards—had such intercourse frequently. I cannot tell how often. I gave birth to a child on the first of *September*, 1857. Defendant is the father



of the child." The refusal of the Court to sustain the defendant's objection raises the only question in the case.

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Ordinarily, no evidence should be given, either in civil or criminal cases, which does not directly tend to the proof or disproof of the matter in issue. This is, no doubt, correct as a general rule; and under it, the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment. It is, therefore, not competent for the prosecution to prove another distinct offense for the purpose of raising an inference that the accused had committed the offense in question. And for the same reason, it would not be allowable to show on the trial that the prisoner had a general disposition to commit the same kind of offense as that with which he is charged. Thus, in a prosecution for an infamous crime, an admission by the accused that he had committed such an offense at another time, and that he had a tendency to such practices, ought not to be admitted. *Am. Crim. Law*, 238.—*Barton v. The State*, 18 Ohio R. 221.—1 *Lead. Crim. Cases*, 189. The reasons on which these positions are founded are sufficiently obvious. The proof must correspond with the issue. It is important that the accused should not be taken by surprise; and it cannot be expected that he will be prepared to defend himself against any charge other than that exhibited against him. There are, it is true, exceptions to the rule to which we have referred. For instance, where several felonies are connected together, and each forms a part of the entire transaction, then the one is evidence to show the character of the other. So where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offenses committed by him, though not charged in the indictment, are admissible. 1 *Lead. Crim. Cases*, 185, *et seq.* But these exceptions do not apply to the case at bar. Here, the indictment contains a single charge of incest, which was proved to have been committed on the first of *December*, 1856; and having thus proved the charge as laid, the state propounds the inquiry whether defendant had sexual intercourse with the witness at any subsequent time. We



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perceive no reason why this question should have been deemed legitimate. The crime perpetrated on the day named was fully proved by the evidence, was an entire transaction, and could not, therefore, be held as connected with any subsequent sexual intercourse, involving another distinct offense. Nor is the present a case in which actual proof of guilty knowledge is at all incumbent on the prosecution. In the investigation of the case made by the record, the jury could not rightfully consider any proof save that which tended to establish one act of incestuous intercourse; and one act of such intercourse having been proved, it seems to follow that any evidence tending to show that the defendant was subsequently guilty of another similar offense, was not only irrelevant, but calculated to produce an improper influence in the minds of the jury.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. S. Miller, H. C. Newcomb, and J. S. Tarkington*, for the appellant.

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### SAUNDERS v. HEATON and Another.

An award of arbitrators is not void because on its face it does not purport to be an award.

In a suit upon an award, the question whether a paper filed is, in fact, the award of arbitrators, is matter of averment and proof; and such proof may be made without violating the rule that parol evidence shall not be admitted to contradict or vary a written instrument.

Where the question submitted to arbitrators was the value of work done on a house, and the award showed specifically the work, and attached to each item the value put upon it,—*held*, that the award followed the submission and was sufficient.

And in a suit upon the award, it is no defense to say that it was for more than by a previous agreement was to have been paid for the work, if no such agreement is referred to by the terms of the submission.

A pleading rejected, or a part of one stricken out, is no part of the record, on appeal, unless made so by a bill of exceptions. The clerk cannot make such pleading or part of a pleading a part of the record, by copying it into the record, and referring to it as the pleading or part rejected.



Where no time is specified in the bond for the making of an award, it may be made at any time, and if it be signed by one of the arbitrators and delivered to one of the parties, it may afterwards be signed by the other arbitrator, and it will be good.

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Monday,  
May 23.

APPEAL from the *Randolph* Circuit Court.

WORDEN, J.—Complaint by the appellees against the appellant on an award, and on an account for work and labor.

The first paragraph avers the making of an agreement, by the parties, which agreement is set out, and is as follows, viz.:

“An article of agreement, entered into the 19th day of *October*, 1853, by and between *Amasa Saunders*, of, &c., of the one part, and *J. S. Heaton* and *John P. Teeters*, of, &c., of the other part. The conditions of the above agreement are as follows, to-wit: The said *J. S. Heaton* and *John P. Teeters* having done work on a certain house belonging to said *Saunders*, situated, &c., and the said *Saunders* not agreeing with the said *J. S. Heaton* and *John P. Teeters* with respect to the value of the work they have done on said house, have agreed with the said *Heaton* and *Teeters* to leave the valuation of said work to two disinterested men, one to be chosen by said *Saunders*, and one by the said *Heaton* and *Teeters*; and in case the two men chosen should not agree, they, of themselves, and without consulting the wishes of the said *Saunders* and the said *Heaton* and *Teeters*, are to choose a third man to examine said work, place a valuation thereon, and agree or disagree with the first two men chosen, and the said *Amasa Saunders* and the said *J. S. Heaton* and *John P. Teeters* further agree that they will abide the decision of said men, be that decision what it may.

“Witness our hands and seals, this 19th day of *October*, 1853.

[Signed]

*Amasa Saunders*, [SEAL.]

*J. S. Heaton*, [SEAL.]

*John P. Teeters*, [SEAL.]”

The complaint avers that, in compliance with the agreement, the plaintiffs selected one *Jacob Killian*, and the defendant selected one *Nathaniel D. Ferrell*, both disinter-



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ested and competent men, to value said work, who proceeded to such examination, and who, in writing, made out their valuation or award (a copy of which is also filed), from which it appears that the arbitrators valued the work at the sum of 370 dollars, 87 cents, of which the defendant had notice; that the defendant has not abided by the decision of said arbitrators in this, that he has wholly failed and refused to pay, &c.

The award is as follows, viz.:

"To 990 feet timber, at 2½ cents,.....	\$24 30
To framing 1490 feet timber, at 6 cents,.....	89 40
To framing 2704 feet of timber, at 1 cent,.....	27 04
To framing 3661 studding, 1 cent,.....	36 61
To framing 924 rafters, at 1 cent,.....	9 24
To 2130 feet roofing, at \$1 50 per square,.....	31 33
To 203 feet small braces, at 2 cents,.....	4 06
To 100 feet Turkish cornice, at 37½ cents,.....	37 00
To 70 feet center sill, at 2 cents,.....	1 40
To 2650 feet weatherboarding, at \$1 50,.....	39 75
To 2090 feet rough weatherboarding, at 75 cents,.	15 58
To 108 feet corner boards, at 2 cents,.....	2 16
To 48 window and door frames,.....	60 00
	<hr/>
	\$377 87
A damage of house not being plumb,.....	7 00
	<hr/>
	\$370 87

[Signed]

*Jacob Killian,  
Nathaniel D. Ferrell."*

The second paragraph was for work and labor, substantially as specified in the above award.

To the first paragraph a demurrer was filed, which was overruled, and the defendant filed an answer of nine paragraphs, a part of the eighth of which was stricken out, a demurrer sustained to the seventh, and the others led to issues of fact. Trial by the Court, finding for the plaintiffs for the sum of 180 dollars, 64 cents, and judgment on the finding, a motion for a new trial being overruled.

The errors assigned are—



1. Overruling the demurrer to the first paragraph of the complaint.

2. Sustaining the demurrer to the seventh paragraph of the answer.

3. Setting aside portions of the eighth paragraph of the answer.

4. In admitting in evidence the above award, as an award.

5. In finding and rendering judgment for the appellees.

Several causes of demurrer to the first paragraph of the complaint are assigned; but as the only one discussed in the brief of counsel relates to the validity of the award, we shall examine no others in detail. The other causes of demurrer point out omissions which would probably be sufficient cause for setting aside a statutory award where the submission is to be made a rule of Court, but can have no influence upon a common-law arbitration and award, as was the case here. *Titus v. Scantling*, 4 Blackf. 89.

It is objected that the award is void for uncertainty.

The award, on its face, does not indicate that it is an award, but otherwise it appears to be sufficiently explicit. It sets forth the work, and the value put upon it by the arbitrators, with a good deal of particularity; and a party knowing what was submitted to them, and that the paper in question was the award of the arbitrators, would know from it, at once, what was intended by them.

We are of opinion that the award is not void because, on its face, it does not purport to be an award, or, in other words, because the arbitrators did not set forth in the award that the paper in question was their award in the premises. If the paper filed was in fact the award of the arbitrators, that is a matter of averment and proof. The fact that the paper in question was the award of the arbitrators, could be proven without at all violating the rule that parol evidence shall not be admitted to contradict or vary a written instrument. Such evidence only applies the instrument to the subject to which it relates, and is admissible. 1 Greenl. Ev., § 286, *et seq.*—*Harris v. Doe ex dem. Barnett*, 4 Blackf. 369.

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Besides, the current of authorities establishes the proposition, that although an award be uncertain on its face, yet if certainty can be obtained by something *dehors*, the objection may be cured by averment. *Grier v. Grier*, 1 Dall. 173.—*Jackson v. Ambler*, 14 Johns. 96.—*McKinstry v. Solomons*, 2 *id.* 57.—13 *id.* 27.—*Case v. Ferris*, 2 Hill, 75.—*Butler v. The Mayor of New York*, 1 Hill, 489. Such is also the *English* doctrine. In 1 Steph. *Nisi Prius*, p. 114, it is said that, "in fact, a *prima facie* uncertainty, or want of conclusiveness in an award, does not vitiate it, if it be capable of being rendered certain or conclusive; and the award may be good or bad according to the event." Applying this principle to the award in this case, it seems to be sufficient. On the face of it, it is uncertain whether it is intended to be an award or not; but it is substantially averred in the complaint to be such, and we think this is sufficient, in testing the validity of the complaint.

Other cases might be cited that would sustain the validity of the award. In *Ott and Becker v. Schroepfel*, 1 Seld. 482, it is said that "Any form of words which amount to a decision of the question submitted is good as an award. No technical expressions are necessary, nor any introductory recitals."

In *Matson v. Trower*, 21 E. C. L. 371, the following award was held good, viz.: "I am of opinion that Messrs. *Matson & Co.* are entitled to claim of Messrs. *Trower & Co.* £134 for non-performance of their contract for fifty puncheons of brandy."

In *Hawkins v. Calclough*, 1 Burrows, 274, it was said by Lord MANSFIELD that "Awards are now considered with greater latitude than formerly." And it is right that they should be liberally construed, because they are made by the judges of the parties' own choosing."

In *Spear v. Hooper*, 22 Pick. 144, PARKER, C. J., remarked that "Strict technical objections are not to be favored. No precise form is necessary; it is to be construed liberally; and the main consideration for the Court is, to ascertain whether the matter submitted has been



substantially considered and finally passed upon by the arbitrators." May Term,  
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Viewing the paper in question as being the award of the arbitrators in the premises, we are of opinion that it is sufficient in other respects. The question submitted to them was the value of the work done by the plaintiffs on the house of the defendant. They have set forth specifically the work, and attached to each item the value put upon it by them. In the language of the Court, in the case of *Butler v. The Mayor of New York*, *supra*, "If it be expressed in such language that plain men, acquainted with the subject-matter can understand it, that is enough, no matter how short and elliptical." SAUNDERS  
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In the case of *Efner v. Shaw*, 2 Wend. 567, a case very similar to the present, it was held that a promise to pay will be implied from an agreement of the parties to abide by the decision of the persons chosen to appraise the value of work done by one party for the other.

There was no error in overruling the demurrer to the complaint.

The seventh paragraph of the defendant's answer avers that the work mentioned, &c., was done under a special contract whereby the plaintiffs were to build the house, and finish and complete it in a good workmanlike manner, for the sum of 390 dollars; wherefore it became the duty of the arbitrators in valuing the work done by the plaintiffs on the house, to estimate the whole work at the price fixed by the said contract, and deduct from that the amount requisite to complete the part of the work left unfinished; but the arbitrators mistook their legal duty, and valued the work according to the opinion of said arbitrators, independent of, and without regarding the said special contract, or their duty thereunder, wherefore, &c.

There was no error in sustaining the demurrer to this paragraph of the answer. The thing referred to the arbitrators was "the valuation of the said work," and the arbitrators were to "examine it, and place a valuation thereon," and the parties were to abide by the decision, whatever that might be. The arbitrators have followed the submis-



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sion, and have properly discharged their duty in the premises. According to the terms of the submission, the arbitrators were to put a valuation upon the work according to its reasonable worth, and not according to any previous stipulations between the parties. Had the arbitrators pursued the course designated by the answer, the award would probably have been void, as being contrary to the terms of the submission, and beyond the authority of the arbitrators. 1 Steph. *Nisi Prius*, 83.

It does not appear that the arbitrators were informed of the existence of any previous contract between the parties as to the building of the house; nor that they were requested to make the valuation accordingly; but had this been done it would not have availed the defendant, for, by the terms of the submission, no such standard of valuation was contemplated. The arbitrators were not called upon to determine how much the work done would be worth, on the supposition that the whole job was worth 390 dollars, but to "examine the work and place a valuation thereon." By this submission, we think the defendant, as well as the plaintiffs, waived any right to look to any previous contract between them, to ascertain the price or value of the work in controversy. Instead of relying on the contract as to the value of the work, they submitted the question of value to the arbitrators, and agreed to abide the decision, whatever it might be, and by that agreement we think they are bound.

In relation to the ruling of the Court, in striking out certain portions of the eighth paragraph of the answer, the point is made by counsel for the appellees, that no exception was taken. We are of opinion that no valid exception was taken to the ruling on that point, and shall, therefore, not inquire whether or not the matter was properly stricken out. There is no bill of exceptions making the parts rejected a part of the record. A pleading rejected is no part of the record, unless made so by a bill of exceptions. *Chrisman v. Melne*, 6 Ind. R. 487. The record states that the Court "set aside so much of the eighth paragraph as is included in brackets," and there are certain words in-



cluded in brackets, in the paragraph, as we find it in the record. Now those words included in brackets are a part of the answer, or they are not. If they be deemed a part of the answer, the matter stricken out is not shown. If they are no part of the answer because they were stricken out, the clerk could not make them a part of the record by copying them into the paragraph. Hence, there is nothing legally before us to show what was stricken out, and therefore we cannot determine the correctness of the ruling, but must presume it to have been correct.

What we have said disposes of the first three errors assigned. The fourth relates to the evidence.

On the trial, it appeared that the arbitrators, *Jacob Kilian* and *Nathaniel D. Ferrell*, having been chosen and called upon by the parties, proceeded to examine the work, as exhibited to them by the parties, and to fix their valuation upon the same, and they made out their award as set out in the complaint. The parties were present, and one of the arbitrators inquired to whom the award should be given, and *Saunders* replied that it made no difference, and the award was handed to *Teeters*. The award does not appear to have been signed by the arbitrators, at that time, at least not by both of them, but it was afterwards, and within two or three weeks, signed by them both. On the award being offered in evidence, the defendant objected, because "it was not an award, as it appeared upon its face, and that without explanation and extrinsic evidence it could not be known to be an award, made under the submission made by the parties; and because it was not signed by the referees until long after it was delivered by them," but the objection was overruled, and exception taken.

What we have said in reference to the award, in discussing the validity of the complaint, disposes of the first branch of the objection, and we shall add nothing further on that point except the observation that the proof abundantly showed that the paper was intended by the arbitrators to be their award in the premises, and was, in fact, their award.

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It is insisted that as the award was not signed by the arbitrators at the time it was delivered to one of the parties, it could not be afterwards signed so as to make it valid; and the cases of *The Indiana Central Railway Co. v. Bradley*, 7 Ind. R. 49, and *The Jeffersonville Railroad Co. v. Mounts*, *id.* 669, are relied upon to sustain this position. Those cases involve statutory proceedings where the arbitrators or referees are required to return their proceedings into Court, and it is held that when they have done so their authority is at an end. But it is not perceived how that principle would affect the case at bar. Where no time is specified in the bond for the making of an award, as in the case at bar, it may be made at any time, and will be good. *Nichols v. The Rensselaer, &c., Insurance Co.*, 22 Wend. 125. If at the time the paper was delivered to *Teeters*, it was altogether invalid, and no award at all, because not signed, the power and authority of the arbitrators were not thereby terminated. The authority still continued in them to attach their names to the paper and thereby make it their award. Until that was done they had made no award, nor had they executed the authority vested in them so as to terminate their functions.

We think there was no error in the ruling of the Court in this respect.

The last error assigned presents no question for our consideration. *King v. Wilkins*, 10 Ind. R. 216. We may remark, however, that had the refusal of the Court to grant a new trial been assigned for error, it would not have availed, as upon looking into the evidence we see no cause to disturb the finding.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*J. Smith, M. Way, and B. McClelland*, for the appellant (1).

*W. A. Peelle and T. M. Browne*, for the appellees.

(1) Counsel for the appellant cited the following authorities :

1. The award should have been made with reference to the special contract. *McKinney v. Springer*, 3 Ind. R. 59.—*Claypool v. Miller*, 4 Blackf. 163.—*Ran-*



*dall v. Randall*, 7 East. 81.—*McMahon v. The Cin. and Chic. Railroad Co.*, 5 Ind. R. 413. May Term, 1859.

2. There was no valid award. McDonald's Treat. 306.—*Crosbie v. Holmes*, 3 Dowl. and Lowndes, 566.—*Hays v. Hays*, 2 Ind. R. 28.—*Parker v. Eggleston*, 5 Blackf. 128.—*Lock v. Villiarry*, 27 E. C. L. 135.

3. The award, to be good, should be good as a judgment, and good without averment. 1 Bac. Abr., tit. Arb., E, 2—p. 331, Bouv. ed.

4. The power of the arbitrators terminated before the award was signed. *The Jeffersonville Railroad Co. v. Mounts*, 7 Ind. R. 669.—*The Ind. Cent. Railway Co. v. Bradley*, *id.* 49.

SORIN  
v.  
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### SORIN v. OLINGER, Administrator

Accounts for boarding, clothing, and educating the children of an intestate after his death, are not demands against his estate, and his administrator has no right to pay them.

But where the intestate, in his lifetime, took the promissory note of A. for a large sum of money, at the same time entering into a parol agreement with A. that the latter should board, lodge, and educate certain of his children at an institution of learning of which A. was president and general agent, and that A.'s accounts therefor should be applied in payment of the note; and the boarding, lodging, &c., were furnished, during the life of the intestate, both before and after the maturity of the note, and continued to be furnished, pursuant to and in reliance upon the agreement, after his death; and after the death of the intestate, the accounts were presented to his administrator, and by him settled and allowed to go in payment of the note: *Held*, that the agreement was valid, and had it been fully executed at the maturity of the note, it would have constituted a bar to an action upon it. *Held*, further, that, as the intestate before his death permitted A. to continue to furnish to the children of the intestate the board, &c., after the note matured, thereby assenting that he should proceed to board and educate them, as originally agreed, in payment of the note; and as the administrator not only suffered him so to proceed, but allowed his accounts as a proper credit on the note,—A., as defendant in a suit upon the note brought by the administrator *de bonis non*, should be allowed to stand as he would have stood had his entire demand, as allowed by the administrator, accrued before the intestate's death.

*Quære*, whether those interested in the estate might sue the administrator on his bond.

APPEAL from the *St. Joseph* Circuit Court.

DAVISON, J.—The appellee, as administrator of the estate of *Francis La Fontaine*, deceased, brought this action

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against *Sorin*, who was the defendant, upon a promissory note for the payment of 2,000 dollars. The note bears date *January 22, 1844*, and is payable to the plaintiff's intestate at three years, with interest.

Defendant's answer contains four paragraphs, on all of which issues were made. As the fourth states the ground mainly relied on in defense of the action, that paragraph alone will be noticed. It is substantially as follows:

"When the defendant gave the note in suit, he was, and ever since has been, the president and general agent of the *University of Notre Dame Du Lac*. He gave the note on account of the business of the university, and the same, at the time it was given, was secured by a mortgage which is on record in *St. Joseph* county. At the time of the giving of the note, and afterwards during the lifetime of *Francis La Fontaine*, it was agreed between the defendant, as such president and agent, and *Francis La Fontaine*, that *Lewis, Thomas, and John La Fontaine*, sons of said *Francis*, should be received, boarded, lodged, educated, and provided for at said university, and that the reasonable cost and expenses of such board, &c., should be applied toward the payment of, and credited upon, said note. In pursuance of said agreement, *Lewis, Thomas, and John La Fontaine* were then received into the university, and boarded, lodged, provided for, and educated therein, until the reasonable cost and value of the same amounted to a large sum, viz., the sum of ——— dollars, which was sufficient to pay off and discharge said note, excepting only a balance of 50 dollars, all which was done in reliance upon the agreement with *Francis La Fontaine*. On the 14th of *October, 1851*, an account for boarding, lodging, providing for, and educating said *Lewis, Thomas, and John*, was presented to one *Julian Benoit*, who was then the sole administrator of the estate of the decedent, and was admitted and settled by him, and the entire amount thereof was by him then and there applied on said note and mortgage, whereby the same was fully paid and settled, excepting the aforesaid balance, for which it was then agreed between them that defendant should give a new note to the



administrator. And in pursuance of the settlement so made, the administrator then and there entered full satisfaction of said mortgage on the record thereof, which yet remains in full force, &c. It is averred that, by accident and inadvertence, the note was not surrendered, &c. The accounts alleged to have been presented to and allowed by the administrator, appear in the record, and, in the aggregate, amount to 2,800 dollars.

The issues were submitted to the Court, who, at the instance of the defendant, found specially the facts upon which its general finding is based. The facts thus found are these :

"1. Defendant executed the note in suit to *Francis La Fontaine*.

"2. *Francis La Fontaine*, in his lifetime, viz., in November, 1844, sent his son *Lewis* to the *University of Notre Dame Du Lac*, where he remained from the 13th of that month to the 9th of March, 1845, and while there was furnished with articles necessary for his use, and tuition, to the amount of 60 dollars and 72 cents.

"3. That *Francis La Fontaine*, in his lifetime, sent his son *Thomas* to said institution, October 20, 1846, where he remained till October 20, 1847, during which time he was furnished by the institution with board, tuition, and other necessary articles, to the amount of 221 dollars.

"4. That the remainder of the account referred to in defendant's answer arose after the death of *Francis La Fontaine*, who died in May, 1847.

"5. That *La Fontaine*, in his lifetime, intended to apply the expenses that had been incurred at the university for the education of his children upon said note, and that the same was so understood and agreed by the university.

"6. That there was an agreement, at the time of the making of the note, between *Sorin* and *La Fontaine*, that the note was to be paid off and discharged by boarding, lodging, and educating the children of *La Fontaine* at said institution.

"7. That the whole of said account was examined and allowed by *Julian Benoit*, as administrator of the estate of

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*Francis La Fontaine*, and, by agreement between him and defendant, was to be applied upon said note—the note to be given up and a new note given for what remained due on the old note; but no new note was given.

“8. That in pursuance of said agreement, *Benoit*, as such administrator, entered satisfaction on said mortgage.”

And the Court, as a conclusion of law upon the above facts, found—

“That the accounts accruing after the death of *La Fontaine* cannot be applied in payment of the note; and that such application by the administrator, as aforesaid, was void, as against the plaintiff.”

And further, the Court found—“That there was due the plaintiff, after deducting the accounts of *Lewis and Thomas*, as aforesaid, 3,216 dollars.”

Motion for a new trial denied, and judgment, &c.

If *Benoit*, as administrator, had power to make the settlement alleged in the answer and proved by the evidence, or if it was an effective defense to the action, then the judgment of the Circuit Court cannot be maintained; because, in point of amount, it is not consistent with the special finding of the facts. Had the administrator such power? An act in force when these transactions occurred, provides that, “from the granting of the letters, every administrator shall be invested with all the powers and rights of the deceased whom he represents, so far as it respects the personal estate of the deceased, subject to restrictions and limitations of law on account of his trust, and the duties arising therefrom.” R. S. 1843, p. 557, § 376.

These restrictions and limitations are definitely pointed out in the statute, and relate principally to the mode in which the trust is to be executed. And in case the administrator fails to observe them while in the management of the trust, he would be certainly liable on his administration-bond. Still, however, persons who deal with him in matters relating to the estate, cannot be afterwards called on to account, unless, indeed, they knew, at the time of such dealing, that he was acting in violation of his trust, and in fraud of those interested in its due execution. The



fraud vitiates the transaction. Williams on Executors, &c., 4 Am. ed., pp. 796, 799. Under the statute to which we have referred, the administrator is required to proceed with diligence to pay the debts and just demands against the deceased, &c. But, ordinarily, demands like the one before us, for boarding, clothing, or educating the children of the intestate, subsequent to his death, are not demands against his estate, and, consequently, his administrator would have no right to pay them. *Id.* 1534. Unless, then, the agreement between *Sorin* and *La Fontaine*, made at the date of the note, was valid, and has been executed according to its legal effect, the administrator could not rightfully allow the defendant's account in payment of the note. Mr. PARSONS says:—"A suit on a written contract, as a note of hand, may be barred by the execution of a parol agreement, entered into concurrently with the written contract, and agreed to be taken in satisfaction of it." 2 Pars. Cont. 194, and cases there cited. See, also, *Rhodes v. Thomas*, 2 Ind. R. 638, and *Ward v. Walton*, 4 *id.* 75. The principle involved in these authorities seems to apply to the case at bar. As we have seen, the note in suit was given on the 22d of *January*, 1844, payable at one year; and upon the day it was given, the parties agreed that it was to be paid off and discharged by boarding, lodging, and educating the children of *La Fontaine* at the institution. Upon the principle just stated, this agreement must be held valid; and had it been fully executed at the maturity of the note, it would have constituted a bar to the action; but that has not been done; and the question is, can the defendant now, having, since the note became due, proceeded to comply with the agreement, set up such compliance as an effective defense? We think he should, in this instance, be permitted to do so; because the intestate, after the note matured, and before his death, continued his children at the institution, thereby assenting that the defendant should proceed, as originally stipulated, to board and educate them, in payment of the note; and *Benoit*, the administrator, has not only suffered him so to proceed,

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May Term, but has authorized his charge for such educating, &c., as a  
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Under the facts stated in the record, the defendant, in our opinion, should be allowed to stand as he would have stood had his entire demand, as settled by the administrator, accrued before the intestate's death. It may be noted, that the settlement in question is not tainted with fraud; that the administrator simply carried out the agreement made at the date of the note; and though in that he may not have acted in strict conformity with his duty, still the dealing between him and the defendant was in good faith, and the latter, it seems to us, has a right to avail himself of the settlement so far as it was intended to operate as a payment on the note.

Whether those interested in the estate would have a right of action against the administrator on his bond, is a question not before us.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. B. Niles*, for the appellant.

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#### SHULL and Others v. KENNON and Wife.

Under the statute of 1843, a cause was not discontinued by a failure of the clerk to enter continuances, though such entries, when made, were a part of the record, as were the entries of the filing of papers.

The statute of 1843 authorized the Court of Probate to be held at the clerk's office, and declared that the place where the Court was held for the time being should be considered the court-house.

The fact that a part of the heirs of an estate are infants, is no bar to a suit by any one of them for partition; and the Court may set off the share of a single heir, leaving the shares of the others undivided, if such partition is desired, and the property is susceptible of division without injury to the estate.

Where partition cannot be made, a sale of the property is legal.

A party to a partition suit will be held to be a competent appraiser of the lands, upon proceedings being taken for the sale thereof, if it do not appear



that he is an heir, a devisee, a legatee, or a purchaser of some part thereof, or that he is otherwise interested.

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Where lands to be divided lie in two counties, partition or sale of them may be made by the Court in one of the counties, and only one set of appraisers is necessary.

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APPEAL from the *Marion* Court of Common Pleas. *Monday, May 23.*

PERKINS, J.—At the *April* term, 1851, of the Court of Probate for *Marion* county, *Indiana*, *Thomas Kennon* and *Margaret Kennon*, his wife, (late *Margaret Shull*,) filed a complaint for partition of the real estate of *John Shull*, deceased, which was situate in *Marion* and *Hamilton* counties, in the state of *Indiana*. The part lying in *Hamilton* county was separate from that lying in *Marion*.

*Margaret Kennon* was one of the heirs of *John Shull*. The other heirs, being infants, were made defendants, and on the 7th of *May*, 1851, were served with process. They made default at the *February* term, 1852. A guardian *ad litem* was appointed for them, who answered the complaint. Partition was ordered, and commissioners were appointed to make it, at said term. They reported partition impracticable, a sale of the lands was ordered, and appraisers were appointed. The appraisement was returned to the *April* term, 1852, and a sale thereupon ordered. The sale was reported to the *August* term, 1852, confirmed by the Court, and a distribution of the proceeds of the sale ordered.

The sessions of the Court, during these proceedings, were in the clerk's office.

The errors assigned upon appeal to this Court are—

1. Judgment against the defendants after a discontinuance of the cause.
2. Holding of the Court at a place to which defendants were not summoned.
3. Partition and sale ordered which the infant defendants did not ask.
4. A party defendant was one of the appraisers and commissioners.
5. Appraisers from *Marion* appraised the land in *Hamilton* county.



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Under the provisions of our statute, a cause is not discontinued by a failure of the clerk to enter continuances. R. S. 1843, pp. 623, 625.—Ind. Dig. 677. Though, it is true that his entries of them, when made, are a part of the record, as are his entries of the filing of papers.

The statute authorized the Court to be held at the clerk's office, and declared that the place in which the Court was held for the time being should be considered the court-house. R. S. 1843, *ubi supra*. Besides, the summons to the defendants was to appear at the court-house, not in a particular room in it. This Court cannot judicially know that the county clerk's office is not in the court-house.

The fact that a part of the heirs were infants was no bar to a suit by any one of them for partition. R. S. 1843, pp. 811, 812.

It was competent for the Court to set off the share of a single heir, leaving the shares of the others undivided, if such partition was desired, and the property was susceptible of division without injury to the estate; but here no such partition was asked, and the commissioners reported the property not susceptible of division. This report was confirmed by the Court. The evidence that may have been heard by the Court, is not upon the record, and there is nothing appearing which shows that the Court committed any error. All the steps required by the statute seem to have been taken.

A sale was legal where the property could not be divided. R. S. *supra*, 814.

The fourth assignment of error is upon a question of fact which may, and may not, be as asserted in the assignment. The fact that the name is the same in each case, does not conclusively prove that the person was. But concede the fact to be true, nothing appears showing that that person was not perfectly disinterested. He was the administrator of the estate of *John Shull*, deceased. Why he was made a defendant to the partition suit is not very apparent. He was no heir, nor legatee, nor devisee. Nor was he a purchaser of any part of the lands. We see



nothing disqualifying him to act impartially with his associates in discharging the duties to which he was appointed.

As the lands to be divided lay in two counties, partition or sale could be made of them by the Court in one of these counties; and we have seen nothing in the statute requiring two sets of appraisers.

*Per Curiam*.—The judgment is affirmed with costs.

*A. G. Porter* and *L. Barbour*, for the appellants.

*J. L. Ketcham*, *I. Coffin*, and *R. L. Walpole*, for the appellees.

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A dower interest in the real estate of her deceased husband accruing to the widow by virtue of the marriage is assignable.

The right of the widow being equitably assignable, may be enforced, under the code, in the name of the assignee.

*Strong v. Bragg*, 7 Blackf. 62, though correctly decided as a case at law, was incorrectly decided as a case in chancery.

Where a husband, before the 6th of May, 1853, owned land and conveyed it in fee simple, his wife not joining in the deed, and after the taking effect, upon that day, of the statute abolishing dower and substituting a fee simple, the husband died, the wife cannot take either dower or one-third in fee. So far as the statute of 1853 provides that one-third in fee of land so conveyed and vested in the purchaser, shall be divested out of him and vested in the widow of the deceased grantor, it is unconstitutional and void.

Notwithstanding the statute purports to abolish existing tenancies by the curtesy and in dower already in enjoyment, it can only be held to take away inchoate rights.

APPEAL from the *Kosciusko* Court of Common Pleas. *Monday,*

PERKINS, J.—Suit for partition of certain real estate. *May 23.*

The suit is by *Benjamin F. Strong* against *John Clem*. The plaintiff alleges, in his complaint, that he is the owner in fee of one-third of the land in question, and that said *Clem* is the owner in fee of the other two-thirds.

The defendant answers that he is the owner in fee of the whole of said lands, and that the plaintiff is not the



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owner of one-third. The defendant alleges that in 1844 the land was owned by one *Jones*, a married man; and that, in the year aforesaid, *Jones* conveyed the land to one *Parry*, his wife not joining in the deed; that after the 6th of *May*, 1853, *Jones* died, leaving his wife of 1844 surviving him; and that the said *Mrs. Jones*, since the death of her husband, has assigned her interest in the land to the plaintiff, by virtue of which assignment he claims one-third in fee of the land.

The plaintiff demurred to this answer; the Court overruled the demurrer; and final judgment was rendered against the plaintiff.

The first question arising in this case is, whether a dower interest accruing to the widow, in the real estate of her deceased husband, by virtue of the marriage, is assignable; and we think it is. Upon the death of the husband, the previous inchoate right of the wife becomes consummate—a vested right, lying, it is true, in action, but still vested. It is a right, a chose in action, arising, not out of tort, but contract. Such rights of action, and such interests, were assignable in equity, at common law, so as to enable the assignee to recover upon them in a suit in his own name, in chancery but not at law. The assignment transferred the equitable, not the legal title. *KENT* says (4 Comm. 61), that “The widow cannot enter for her dower until it be assigned her, nor can she alien it, so as to enable the grantee to sue for it in his own name. It is a mere chose or right in action,” &c. 1 Greenl. Cruise, p. 189. But, per *DEWEY, J.*, in *Slaughter v. Foust*, 4 Blackf. 379, “Choses in action, which, by the common law, are even unsusceptible of assignment so as to enable the assignee to maintain a suit at law upon them in his own name, are capable of being equitably transferred, so that the purchaser may resort to a Court of chancery for redress without the aid of the name of the assignor. No formality is necessary to effect this species of transfer; \* \* \* a debt may be assigned in equity, by parol, as well as by writing.”

And in *Mitchell v. Winslow*, 2 Story's R. 630, where the doctrine of equitable assignments is learnedly examined,



Mr. Justice STORY says: "Courts of equity do not, like Courts of law, confine themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed and *in esse*. On the contrary, they support assignments, not only of choses in action, but of contingent interests and expectancies," &c. No good reason has been assigned for excepting consummate rights to dower. See the limitations upon the above proposition from *Story* in the well-considered case of *Nicoll v. The New York, &c., Railroad Co.*, 2 Kern. 121. See, also, *Burrill on Assignments*, 2d ed., p. 70; 3 Kern. 322; 2 *id.* 622. This right of the widow, then, being equitably assignable, may be enforced, under our present code, in the name of the assignee. For while our statute may not have enlarged the common-law right as to equitable assignments, it has invested the equitable assignee with the right to sue in his own name, as he might formerly in chancery. *Strong v. Bragg*, 7 Blackf. 62, cannot be reconciled with the view we have taken; but that case, rightly decided as one at law, was wrongly decided as a case in chancery. *Todd v. Beatty*, Wright's (O.) R. 460.—1 *Hilliard on Real Prop.*, 2d ed., pp. 164, 165.

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The next question arising is, whether the widow had any interest in the land in question of which to make an assignment, and if so, what? It was not land of which her husband died seized; and were the law in this state as it wisely is in *Vermont, New Hampshire, Tennessee, Georgia, Connecticut, Michigan*, and several other states of the *Union*, that the interest of the wife attaches only to such land (see 1 *Greenl. Cruise*, p. 153), the case would be as simple as the law would be just, and this Court would never have been called upon to investigate it. But such is not the statute of this state. Our statute is, that the interest attaches to all lands owned by the husband during coverture, in the conveyance of which the wife has not joined.

The land in question was owned by the husband in 1844, a point of time during the coverture, was conveyed by him in that year, and the wife did not join in the deed.



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And had the law, at the death of the husband, remained the same as it was when the land was conveyed, the widow would have been entitled to a life estate in one-third of the land—being a dower estate. But the law did not remain the same. On the 6th of *May*, 1853, it was changed; dower was abolished, and the right to a fee simple substituted in place of the right to dower. And the question is whether this latter statute operated to enlarge the estate of the widow into a fee in lands conveyed by the husband while the wife had but an inchoate dower right. For, under the decision in *Noel v. Ewing*, 9 Ind. R. 37, the widow, in this case, has a fee-simple right or nothing. In that case it was decided that the act of 1853 was not prospective, but immediate in its operation. The writer of this, thought that decision wrong, and has not yet changed his opinion. See 9 Ind. R. 54. But it is now an authority which it is better for the public interest that this Court should follow, so far as it is an authority, than to overrule it. That case decided that inchoate rights of dower were abolished; and all the judges conceded the power of the legislature to abolish such rights, because they were not consummate. That case further decided that the statute of 1853 gave Mrs. *Ewing* a fee in lieu of dower in the real estate then the subject of controversy. It did not decide the question now before the Court. In the *Ewing* case, the husband had not conveyed the land for a consideration before the new act took effect. In the case now before the Court, he had.

Here, then, we have this case. In 1844, the husband owned the land in question. The entire fee was in him. He sold and conveyed that entire fee to the purchaser. That fee was then encumbered by the right of the wife to use one-third of the land for the period that she might outlive her husband, and nothing more. It was a mere contingency. If she deceased before her husband, then the entire fee remained in the purchaser unencumbered. Subsequently to this sale and purchase, the legislature enacted that one-third of the fee so purchased, paid for, and vested in the purchaser, shall be divested out of him and vested



in the widow of the deceased grantor. And the question is, can a law be made to thus operate? It would seem that the proposition was too plain for argument. Such a law takes the property of one person and vests it in another. It divests vested rights. It impairs the obligation of the contract of sale and purchase. It is plainly in conflict with the constitution, and, so far as it operates as above stated, is void.

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The plaintiff, then, cannot maintain this action upon the dower right of the widow. That never vested. Before the death of the husband, the event necessary to the consummation of that right, the right itself was abolished by law. The law came in the place of the death of the wife, and determined the contingency as to the vesting of dower in favor of the purchaser of the land.

The plaintiff cannot maintain his action upon the fee-simple right, as it never vested. It was never, indeed, even inchoately, created. The statute attempting to create that estate being, so far as applicable to this case, void. Hence, the decision below was right, and must be affirmed.

It is unnecessary, therefore, to inquire whether, if the dower right had not been abolished, the plaintiff could, as in actions for the recovery of real estate, while suing for a fee simple, recover a less estate in partition.

A word here upon the statute abolishing dower. It reads: "Tenancies by the courtesy and in dower, are hereby abolished." 1 R. S. p. 250, § 16.

This section purports to abolish existing tenancies already in enjoyment. This the legislature could not do; but it could prospectively take away the right to such estates in future, where the right had not already vested. Another section saved vested rights; and, as held in *Noel v. Ewing*, *supra*, only those actually vested. 2 R. S. p. 431.

The statute, therefore, under the construction above mentioned, took away inchoate rights of dower, or those not vested, such as that existing in this case at the passage of the statute.

*Per Curiam*.—The judgment is affirmed with costs.

*B. F. Claypool*, for the appellant.



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THE STATE BANK v. CAMPBELL and Others.

Bill in chancery to correct a mistake in a judgment. The facts were these:—  
A plaintiff was in Court prosecuting a suit upon a promissory note, upon which there was apparently due over 400 dollars. The defendant appeared by attorney authorized by a power to confess judgment for the sum he might find due. He entered his cognovit for 223 dollars, and judgment was taken for that amount by the plaintiff. The suit was not prosecuted for any balance, nor was it shown that there was any understanding or agreement that it should at any future time be prosecuted. There was no pretense of fraud. Six years were suffered to elapse after the discovery of the mistake, before suit was brought. *Held*, that the plaintiff neglected his rights, if he had any, and ought not now to be permitted to contradict that the amount for which the cognovit was executed was the amount due.

Tuesday,  
May 24.

APPEAL from the *Shelby* Circuit Court.

HANNA, J.—In *August*, 1840, a judgment was, by confession on a cognovit, rendered in a suit then pending in the *Shelby* Circuit Court in favor of the appellant, and against the defendants, for 223 dollars, on a note then ten months past due, for 400 dollars. A copy of the note, without any credits having been indorsed thereon, was embodied in a warrant of attorney, which was executed by said defendants, and contained, among others, a clause that the attorney of said defendants was authorized to “confess said action for such sum as may appear to our said attorney to be due at such time of confessing judgment.”

The cognovit was indorsed in writing upon the back of said warrant of attorney, and after properly entitling the case is as follows: “And the said defendants, by *William Quarles*, their attorney, come and defend, &c., and waive the issuing and service of process herein, and say that they cannot gainsay or deny the plaintiff’s action herein, and that the plaintiff has sustained damage by reason of the non-performance of the premises in the declaration mentioned, in the sum of two hundred and twenty-three dollars, for which said sum they here now freely confess judgment. *W. Quarles*, for defendants.”

In *August*, 1848, this suit was instituted by bill in chancery, averring the above facts and others, to-wit, that be-



fore the entry of said judgment, no payment had been made upon said note; that there was a mistake in the confession and rendition of said judgment, in the amount thereof, which was not discovered by said plaintiff, &c., until long afterwards, to-wit, about two years; that said defendants had been requested to correct the same, and had refused, and praying that the same might be corrected, or a decree rendered for the balance alleged to be due on said note, &c.

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The defendants, in their answers which were, in pursuance of the prayer in said bill, without verification under oath, admitted the execution of the cognovit, and the rendition of judgment, but denied that there was any mistake in the amount, and averred that the same was rendered for the full amount then due the bank upon said note.

In *April*, 1853, the cause was set down for a hearing upon the bill, answers, replications, and depositions, and a decree rendered in favor of said defendants, ordering said bill to be dismissed, and for costs, &c.

The Court found "that there is no mistake in the rendition of the judgment; that a Court of chancery has no power to exert any authority over a Court of law, or to rectify its records; and that the judgment of a competent Court is final and conclusive until reversed, and cannot be relitigated in another Court; that the subject-matter of that suit was the note described in the bill of complaint; and that if judgment was not awarded in said Court for all that said complainant was entitled to, she should have appealed; that the subject-matter is cognizable in a Court of law."

There are two errors assigned—

1. It was error to find that there was no mistake in the confession and rendition of judgment.
2. The Circuit Court decreed that if there was such mistake, a Court of chancery could grant no relief.

The consideration of the first, would involve an investigation of the evidence, and the second, the equity of the case.

In determining as to whether the final action of the



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Court was correct or not, it is not necessary that we should decide as to the propriety of all the branches of the finding upon which that action was based.

We will first consider the second error assigned.

It will be recollected that the bill alleges that there was a suit pending upon said note at the time of the execution of said warrant and cognovit, and the entry of judgment thereon.

In Tidd's Practice it is stated, in treating of cognovits, confessions, &c., that "the confession is either of the whole or part of the cause of action. If it be of the whole, and not upon terms, the plaintiff's attorney may immediately sign final judgment, and take out execution thereon; but if it be not of the whole, he can only sign judgment for the part confessed, and the action must proceed for the residue." Vol. i., p. 504.

We are not aware that at that date we had any statute regulating an offer to confess a part of a demand, as we now have; therefore, this proceeding must be governed by the common-law practice then in force, so far as applicable.

The facts, then, shown by the pleadings either directly or incidentally, are, that the plaintiff was in Court prosecuting a suit on a note, upon which there was apparently due over 400 dollars. The defendants appeared to that action by their attorney, who was authorized, by the written power he held in his hand, to confess a judgment for the sum he should find to be due. He entered his cognovit upon the back of the warrant for 223 dollars. The judgment was taken for that amount by the plaintiff. The action was not prosecuted for the balance that is now said to be due. Nor is it averred that there was any understanding or agreement that it should be at any future time. Do not these facts raise a presumption that the plaintiff ought not now to be permitted to contradict that the amount for which the cognovit was executed was at least acquiesced in by the plaintiff, as the true amount due? See *The State Bank v. Young*, 2 Ind. R. 171.

If the answer to this question is in the affirmative, that



would end the case; but if it is to the reverse, and these facts do not constitute an estoppel, still another question will arise upon the point of diligence or negligence of the plaintiff.

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Several cases might be referred to, in which persons against whom judgments were rendered have sought relief in a Court of equity.

In *The Marine, &c., v. Hodgson*, 7 Cranch, 332, it is said by the Supreme Court of the *United States*, that "it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of chancery." See, also, *Creath v. Sims*, 5 How. 192; *Walker v. Robbins*, 14 *id.* 584; *Hendrickson v. Hinckley*, 17 *id.* 443.

In our own Reports, it is said that "where a party is not prevented by fraud or accident, without any fault on his part, from defending himself at law, and neglects to do so, equity will not relieve." *Parker v. Morton*, 5 Blackf. 1.—*Raburn v. Shortridge*, 2 *id.* 480.—*Skinner v. Deming*, 2 Ind. R. 561.—*Shilmire v. Thompson*, 2 Blackf. 271.—*Jarboe v. Kepler*, 4 Ind. R. 177.

We know of no principle of equity by which a plaintiff should be regarded as standing in Court with more rights than a defendant.

If ignorance of facts consequent upon negligence, whereby the rights of a defendant have greatly suffered, will not, when presented to a Court of equity, justify an interference to grant relief to such defendant, (2 Blackf. 272,) we are not advised of any rule of equity which, under like circumstances, would justify the same Court in granting relief to a plaintiff.

There is no pretense in the pleadings that there was anything either done or said upon the part of the defendants, in the confession of the judgment, which operated as a fraud, or even as a surprise upon the plaintiff.



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Admitting the allegations in reference to the amount due—the amount for which judgment was taken, and the circumstances under which it was taken—to be all true, and they show only a clear case of negligence upon the part of the plaintiff. Upon this branch of the case, the plaintiff might, with more show of equity, have asked to be relieved from the fruits of this neglect, if the aid of the Court had been sought as soon as the alleged mistake was discovered; but it is shown by the bill that some six years were suffered to elapse before suit brought, after the mistake was discovered, even if ignorance of the contents of the judgment could be set up, which we are strongly inclined to doubt.

The want of equity in the bill was a sufficient reason for its dismissal, and dispenses with the necessity of examining the first error assigned. *Parker v. Morton*, 5 Blackf. 3.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*H. C. Newcomb* and *S. Yandes*, for the bank (1).

*T. A. Hendricks*, for the appellees (2).

(1) Counsel for the appellant cited Bouv. Law Dict., tit. Clerical Error; Story's Eq. Juris., §§ 167 to 176.

(2) Mr. *Hendricks*, contra, cited Story's Eq. Juris., §§ 152, 157, and note 5; *Mahm v. Reeve*, 6 Blackf. 215; *Cooper v. Butterfield*, 4 Ind. R. 423, and authorities there cited.

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Suit by the assignee on promissory notes, and to foreclose a mortgage. Answer, admitting the execution of the notes and mortgage; that they were held by the plaintiff, as assignee, and had not been paid; but setting up a counterclaim as follows: That they were given to secure the payment of the balance of the price of a steam engine and boiler which, by agreement, *A. D. & Co.* manufactured for the defendants, to be used in a saw-mill, of which the makers had knowledge, and made them expressly for that purpose; that the payee was one of the firm of *A. D. & Co.*; that said boiler was worthless, in consequence of defects in materials and workmanship; that



soon after it was set up, owing wholly to said defects, it burst, by which it was destroyed, and damaged the defendants by injury to the mill, &c.; that the price paid was a fair price for a good article for that purpose; that defendants had no knowledge of the defects; that the value of the other machinery was less, after the bursting, than the sum already paid. Prayer, that the damages, &c., may be allowed, &c. *Held*, sufficient on demurrer.

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*Held*, also, that if the engine, &c., proved unsound and unfit for the purpose for which it was to be applied; and if, in attempting to apply it, the purchaser, without fault on his part, in consequence of such unsoundness and unfitness, suffered damage by the destruction of that kind of property which it was reasonable that the parties to the contract contemplated would be necessarily placed in close proximity to such machinery, the injury must be viewed as the natural and legitimate result of the breach of the warranty.

Reply, 1. A general denial. 2. Specific denials, and an averment that if defects existed they were not known to the makers, &c. 3. That the engine, &c., was put up under a contract in writing; that after it was set up and put in operation, the defendant accepted the same, and said contract was canceled and destroyed, and the notes and mortgage executed, &c. The specific denials in the second paragraph of the reply were stricken out, on the ground that they but repeated the issue made by the general denial.

*Held*, 1. That issues presented to a jury should be plain and simple. Repeated denials of the adversary pleading tend to complicate the issues.

2. That after the special denials were stricken out of the second paragraph of the reply, it was bad on demurrer.

3. That the third paragraph of the reply was bad, because the alleged written contract was not set forth, either by copy or in substance; and because the terms or acts of acceptance were not stated.

APPEAL from the *Steuben* Court of Common Pleas. *Tuesday, May 24.*

HANNA, J.—*Page*, as assignee of one *Armstrong*, brought suit on notes, and to foreclose a mortgage, &c. The complaint was in the usual form.

The defendants answered, and set up a counterclaim, admitting the execution of the notes and mortgage; that the same were held by *Page*, as assignee, and had not been paid, but averring that they were given to secure the payment of the balance of the price of a steam engine and boiler, which, by agreement, *Armstrong, Drake & Co.* manufactured for the defendants, to be used in a saw-mill of defendants, of which the makers had knowledge, and made them expressly for that purpose; that the payee was one of the firm of *Armstrong, Drake & Co.*; that said boiler was worthless, in consequence of defects in materials and workmanship; that soon after it was set up, owing wholly to said defects, it burst, &c., by which it was destroyed,



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and damaged the defendants by injury to the mill, &c.; that the price paid was a fair price for a good article for that purpose, &c.; that defendants had no knowledge of the defects, &c.; that the value of the other machinery was less, after the bursting, than the sum already paid. Prayer that the damages, &c., may be allowed, &c.

The plaintiff demurred to that portion of the answer and counter-claim which attempted to set up damages, the result of injury to the mill-house, &c.

The demurrer was overruled, which presents the first question to be considered, under the points made by counsel.

In *Levy, v. Langridge* 2 Mees. and Wels. 519, 4 *id.* 337, the defendant had sold to the plaintiff's father a gun, for the use of himself and his son, falsely and fraudulently representing the gun to be manufactured by a certain person, and to be well made. The representations were untrue. The gun burst in the hands of the plaintiff, and the defendant was held liable for the damage thereby occasioned to the plaintiff.

In *Batterman v. Pierce*, "The plaintiff sold his wood at auction, and, as an inducement to obtain a better price, he stipulated with the bidders that they should have two winters and one summer to get away the wood, and that, in the meantime, he would insure them against the consequences of setting fire to his adjoining fallow grounds. Upon these terms the purchase was made by the defendant." A note was given, in the usual form, for the price of the wood, and in a suit on that note, the defendant was permitted to set up, by way of recoupment, the damages resulting from the destruction of the wood by fire, in burning off the fallow ground. 2 Sandf. (S. C.) 120.

In *Thomas v. Winchester*, 2 Seld. 397, it was held by the Court of Appeals of *New York*, that a dealer in drugs and medicines who should carelessly label a deadly poison as a harmless medicine, and send it, so labeled, into market, is liable to all persons who, without fault, are injured by using it, &c. It will be observed that the measure of damages was not the difference in the value of the article sold



and that which it purported to be, but the plaintiff recovered damages "for the personal injury and suffering" thereby caused. In the same case, the counsel for the defendant contended that, as the medicine had passed through several hands before it was administered, therefore, if the defendant could be made liable, then, if a smith shoes a horse for *A.*, *A.* sells the horse to *B.*, and so on through several hands, and the horse, while in the use of *D.*, should fall and injure him, in consequence of gross negligence in the shoeing, *D.* could sue the smith and recover. The Court, in the opinion, in response to this, say, that "although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not, by his contract, or by any consideration of public policy or safety, to respond for his breach of duty to any one except the person he contracted with." Thus, impliedly, it appears to us, holding that, to the person with whom he contracted, there would be, under such circumstances, a liability. *Id.* 408.

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Several cases are put in Sedgwick on Damages, somewhat similar to the one at bar in principle, to-wit:

If a house should be let for a term of years, and when the term was half expired, the lessee should be evicted by the true owner, the lessor is liable for the damages resulting from the expense of moving, and the rise of the rent of similar tenements, but not for an injury to a business established in the house by the lessee, &c., because this is damage that could not have been contemplated at the time of the contract; but if the building had been let for the express object of carrying on a particular business, then the injuries which otherwise would be too remote, become direct, &c. If a carpenter sell timber for the express purpose of propping up a house, and by reason of the timber being defective, the building should fall and be destroyed, he will be held liable, not only for the difference between the price of good timber and that sold, but also for all damage done the building. pp. 58, 59.

Of the same character, is the case of *Borradaile v. Brun-*  
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*ton*, 8 Taunt. 535, which was an action on a warranty of a cable for a certain time. It was alleged that within the time the cable broke, and the anchor to which it was fastened was thereby lost. It was held that a verdict for the value of the cable and anchor was correct.

So, in *Dewint v. Wiltzie*, 9 Wend. 325, the plaintiff was the owner of a ferry, at which was a tavern stand which he also owned. He leased the ferry, the lessee covenanting to keep it in good order, which he failed to do, but discontinued it and removed it to his own wharf, in consequence of which the tavern was injured in its business, so that, although the plaintiff had formerly let it at 300 dollars, he could not let it at all. Upon a suit on the covenant in the ferry lease, it was held that the plaintiff was entitled to recover his actual damage in the loss of rent, as the natural consequence of the breach of the covenant.

So in *White v. Mosely*, 8 Pick. 356, which was an action of trespass for breaking a mill-dam, the Court held, that not only the amount necessary to repair the dam, but also the damages caused by interruption to the use of the mill, and the diminution of the plaintiff's profits on that account, were well included in the amount of the damages. *Driggs v. Dwight*, 17 Wend. 71.—4 Barb. 261.—6 *id.* 423.—2 Cush. 46.—*Brown v. Edgington*, 2 M. and Gr. 279. In the case last cited, the plaintiff, who was a dealer in wine, &c., ordered of the defendant, who was a dealer in ropes, &c. (but who held himself out as a manufacturer and dealer), a rope for a crane, to raise and lower casks of wine, &c. The defendant sent his foreman, who took the measure and dimensions of the crane and the rope, &c., and was informed it was wanted to raise pipes, casks, &c., from the cellar, and let them down into the street. The defendant procured another person to make the rope, without informing him what it was for. The servant of the defendant fitted the rope to the crane on the 5th of *September*, 1837. On the 20th of *February*, 1839, in removing a pipe of port wine from the warehouse to a cart, the rope broke, and the cask falling into the street the wine was lost. The jury returned a verdict for the plaintiff for



£40, but negatived any knowledge upon the part of defendant, of the defects in the rope.

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Upon a motion founded upon this verdict, it was held by TINDAL, BOSANQUET, ERSKINE, and MAULE, each giving a separate opinion, that the defendant was liable, as on an implied warranty, for the reasonable fitness of the rope for the purpose. Nothing is said in either of the opinions upon the question of the measure of damages; but it does not appear that any damage was laid in the declaration, except for the value of the wine lost, and the price, to-wit, £10, of a new rope to supply the place of the old one. Without doubt, the verdict of the jury included the value of the wine. That it was properly included, if the plaintiff could have judgment at all, appears to have been conceded, for nothing is said about it in the argument of *Talfourd and Channell, Sergeants*, 40 Eng. Com. Law, 371.

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In the above cited case of *Driggs v. Dwight*, there was an agreement by which a tavern stand was to be rented for a year at a fixed rent. The plaintiff moved his family to the place. The lessor refused to give possession. The lessee brought suit. Proof was offered by both parties of the yearly value of the property. The plaintiff also proved that he had moved his family and furniture, &c., which evidence was objected to. The judge charged the jury, "that the plaintiff was entitled to recover the damages necessarily resulting from the breach of the contract, and that the expenses of removing his family and furniture, &c., was a proper item of damage." The Supreme Court of *New York* held, that the expenses of removal were properly admitted, and that the damage was not confined to the difference between the price to be paid and the value of the property. The case in 4 Barb., of *Giles v. O'Toole*, is upon the same question of letting premises, and the decision to the same effect.

The case in 6 Barb., *Lawrence v. Wardwell*, was also for damages for refusal to give possession of premises leased, and which the lessee intended to use for a certain business. It was held in that case, that testimony was properly received of the loss which the plaintiff sustained,



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by being compelled to pay the men that he was obliged to discharge, owing to his not being able to get possession of the premises at the time agreed upon.

Many other cases might be cited to the same purport.

In actions of tort, the doctrine laid down in 2 Greenl. Ev., § 268, has been often applied, to-wit, that "The natural results of a wrongful act are understood to include all the damage to the plaintiff, of which such act was the efficient cause, though, in point of time, the damage did not occur until sometime after the act done."

In *McAfee v. Crofford*, 13 How. 447, the Supreme Court of the *United States* held that, in an action of trespass for abducting slaves, it was not erroneous for the jury to include in the verdict, as damages, the value of corn destroyed by cattle, and wood swept off by a flood, in consequence of the absence of said slaves by such wrongful act. See *Goodloe v. Rogers*, 10 La. R. 831; *Parmalee v. Wilkes*, 22 Barb. 539.

We are aware that there are cases, and respectable law-writers, holding a doctrine somewhat more rigid, in reference to what they term the proximate cause of injury, than the principle which may be deduced from the cases and authorities first above referred to.

✓ In the case at bar, it appears to us that, as it is directly averred that the manufacturers were engaged to, and did construct the engine, &c., for a special purpose, they impliedly warranted it to be reasonably fit for that purpose. *Brenton v. Davis*, 8 Blackf. 317.—1 Pars. on Cont. 469, and authorities cited.

Whether all parts of the various decisions referred to should be held as law or not, we may safely say, that there is enough that we do approve, to enable us to determine, in the case at bar, that if the engine, &c., proved unsound and unfit for the purpose to which it was to be applied; and if, in attempting to apply it, as purposed, the purchaser should, without fault upon his part, in consequence of such unsoundness and unfitness, suffer damage by the destruction of that kind of property which it was reasonable that the parties to the contract contemplated would be neces-



sarily placed in close proximity to such machinery, we are unable to perceive any good reason why such injury should not be viewed as the natural and legitimate result of the breach of the warranty. 2 Pars. on Cont. 487.

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It is not necessary for us to attempt to indicate the precise line at which the liability of a manufacturer would cease, under circumstances similar to those in the case at bar. As an instance, suppose that before the time of the accident, in this case, the defendant had, relying upon the soundness, &c., of his machinery, made a heavy contract for the delivery of lumber, at so early a day as to be unable, in consequence of such accident, to fill the same, and was, therefore, compelled to pay damages for the breach of such contract. Would the manufacturer, in such instance, be liable for that damage? See *Bridges v. Stickney*, 38 Maine R. 361; *Blanchard v. Ely*, 21 Wend. 342; 17 *id.* 161; 23 *id.* 421; 24 *id.* 668.

There are some cases that hold that there might be a liability for certain contingent expenses, not here set up, and which appear to us to be still more remote than the damages herein claimed; such as the loss of the use of the mill, the fuel consumed, the delay of the workmen, interest on investment, &c. See cases above cited, and also 3 Barb. 424; 14 *id.* 614; 2 Met. 615; 1 Md. R. 343.

But upon these questions, outside of that directly arising in the case at bar, we would not be understood as intimating any opinion.

For these reasons, we are of opinion the demurrer was properly overruled, even if that was the correct mode of testing the propriety of inserting that clause in the counterclaim, of which we give no opinion.

The plaintiff replied by filing—

1. A general denial.
2. Specific denials of the allegations in the answer, and an averment that if defects existed they were not known to the makers, &c.
3. That the engine, &c., was put up under a contract in writing; that after it was set up and put in operation the defendants accepted the same, and said contract was can-



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celed and destroyed, and the notes and mortgage executed, &c.

On motion of the defendants, a portion of the second paragraph of the reply, to-wit, the specific denials, was stricken out, on the ground that it was but a repetition of the issue made by the general denial.

That the issues to be presented to the jury should be plain and simple, appears to have been one end aimed at, by the framers of the code. We think that repeated denials of the averments of the adversary pleading, would not have that tendency, but would tend rather to complicate the issues—at least in the case at bar.

The defendants then demurred to the second and third paragraphs of the reply, which demurrers were sustained, and we think correctly. After a portion of the second paragraph was stricken out, it was left in so imperfect a condition that it was subject to demurrer. And even if the matter therein set up had been well pleaded, it was not a good answer to the averments in the counter-claim to say that, although defects might have existed, yet the makers should not be held responsible, because they were not aware of that fact.

As to the third paragraph, the demurrer was properly sustained, for the reason that the defense was, that there existed the implied warranty which the law gives against the manufacturer of a specific article engaged for a special purpose, &c. To avoid this, the plaintiff attempts to show two causes: First, that there had existed a written contract, under which the article was manufactured, and therefore no implied obligation could arise. The plaintiff, if he desired to avail himself of any of the provisions of the written contract, if such at any time existed, should have set it forth, or if that was not practicable, then its substance, that the Court might have been informed. Secondly, he avers that the defendants accepted the engine, &c., and the written contract was destroyed. The terms or acts of acceptance should have been specifically set forth, if the plaintiff relied upon the same to discharge the implied obligation which rested upon him by law; if he relied upon



such acts of acceptance as complied with the terms of the written contract, then he should have set forth the contract. A general averment that the engine, &c., was set up for, and operated by, the defendants, is not sufficient.

There was a trial by a jury, and a verdict for the defendants, and motion for new trial overruled, and judgment for defendants.

The refusal of the Court to give certain instructions asked by the plaintiff, is alleged to be erroneous; but as there was no exception taken to that ruling of the Court, we cannot examine it; nor was the exception, under former decisions of this Court, to the charge of the Court, made in such manner as to enable us to examine the instructions given. The exception is general, at the end of a set of instructions, stating distinct propositions of law, some of which are certainly correct. 9 Ind. R. 417 to 429.

*Per Curiam*.—The judgment is affirmed with costs.

*J. B. Howe*, for the appellant.

*A. Ellison*, for the appellees.

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THE NEW  
ALBANY, &C.,  
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V.  
CAMPBELL.

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THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
CAMPBELL and Others.

Where goods transported by a railroad arrive at the place of destination, and are placed upon the platform of the depot, at the usual place of discharging goods, ready for delivery to the consignee, in good order, and he is notified of their arrival, and pays the freight upon them, the liability of the company as carriers is at an end.

If the consignee does not receive the goods, it seems that the carrier must take care of them for a reasonable time for the consignee; but his liability in that respect is that of a warehouseman, and not that of a carrier.

But where the consignee has notice of the situation of the goods at the place of delivery, and pays the freight upon them, and afterwards, without neglect on the part of the warehouseman, the goods are destroyed, the warehouseman is not liable.

It seems, indeed, that the payment of the freight under such circumstances, without any arrangement as to the further custody of the goods by the warehouseman, is equivalent to a delivery, so far as to throw the risk of loss upon the consignee.



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APPEAL from the *Montgomery* Court of Common Pleas.

THE NEW  
ALBANY, & CO.,  
RAILROAD CO.  
V.  
CAMPBELL.

Tuesday,  
May 24.

WORDEN, J.—This was an action by the appellees against the appellants, to recover the value of "three crates of queensware," received by the defendants at their depot at *Lafayette*, to be carried to *Crawfordsville*, and there delivered to the plaintiffs at the defendants' depot.

There are two paragraphs in the complaint, one charging the defendants as common carriers, and one as warehouse keepers.

There was a trial by jury; verdict and judgment for plaintiffs, a motion for a new trial being overruled.

The following are the facts, as they appear by a bill of exceptions:

The goods in question appear to have been transported on the defendants' cars to *Crawfordsville*, the place of delivery, and there unloaded in the defendants' depot; and the depot building being full of goods, the crates in question were placed on the platform of the depot, in a place convenient for loading upon drays, and the usual place of receiving and discharging goods. The goods were unloaded in good order; and the roof of the depot extended over the platform on which they were placed. On the day the goods arrived and were there unloaded, a drayman, who was draying goods from the depot for the plaintiffs, informed the plaintiffs that their crates were outside of the depot on the platform, and that they might get injured; but they told him to let them alone, that they had no room for them. On the next day, the drayman again mentioned the matter to the plaintiffs, and one of plaintiffs' clerks went with the drayman to the depot, and paid the freight on the crates in question. The goods having remained on the platform where they were placed, until the second night after they were thus deposited, they were then destroyed by fire.

These are the substantial facts in the case, and we think it clear that they do not fix any liability upon the defendants as common carriers. It is settled that when goods transported by a railroad arrive at their place of destina-



tion, and are unloaded from the cars and placed upon the platform ready for delivery to the consignee, and he notified of the arrival, the liability of the carrier, as such, is at an end. In such case, if the consignee does not receive the goods, it may be the duty of the carrier to take care of them a reasonable time for the consignee; but his liability in that respect is that of a warehouseman, and not of a carrier. *Thomas v. The Boston and Providence Railroad Co.*, 10 Met. 472.—*The Norway Plains Co. v. The Boston and Maine Railroad Co.*, 1 Gray, 263. In the case last cited, it was very strongly intimated that notice to the consignee was not necessary to terminate the liability of the carrier, as such, but was not definitely decided, for the reason, amongst other things, that the plaintiffs' agent had notice of the arrival of the goods, as had the plaintiffs in the case at bar.

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Some of the remarks of the Court in the case from *Gray*, in reference to the termination of the carrier's liability, are as follows:

"The question, then, is, when and by what act the transit of the goods terminated. It was contended in the present case, that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease until such delivery.

"This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles traversing the common highways and streets, and which, therefore, can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed.

"The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along the line, and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of BULLER, J., in *Hyde v. The Trent and Mersey*



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*Navigation Co.*, 5 T. R. 397: 'A ship trading from one port to another has not the means of carrying the goods on land, and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.'

"Another peculiarity of transportation by railroad is, that the car cannot leave the track or line of rails on which it moves: a freight train moves with rapidity, and makes very frequent journeys, and a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination, should be unloaded, and that all the goods carried on it, to whomsoever they may belong, or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation, by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered—the Court are of opinion that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute an implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or person entitled to receive them, if he is there ready to take them forthwith; or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties, when not altered or modified by special agree-



ment, &c. \* \* \* From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities; first, that of common carriers, and afterwards that of keepers for hire, or warehouse keepers, the obligations of each of which are regulated by law.

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"This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars, and placed on the platform; that if on account of their arrival in the night, or at any other time, when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered; or if, for any reason, the consignee is not there ready to receive them; it is the duty of the company to store and preserve them safely, under the charge of competent and careful servants ready to be delivered, and actually deliver them when called for by the party authorized and entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen, or keepers of goods for hire."

In the case at bar, the goods were unloaded in good order, and placed upon the platform of the depot, the usual place of receiving and discharging goods, and the plaintiffs had abundant notice of their arrival, and they paid the freight thereon. The goods were received upon one day about noon, and the plaintiffs had notice on the same day. On the next day, their clerk or agent went to the depot and paid the freight, and on the night thereafter the goods were burnt up. The liability of the carrier, as such, was terminated when the plaintiffs were thus notified and paid the freight, if not immediately upon the goods being discharged from the cars.

We are also of opinion that the evidence fails to establish any liability against the defendants as warehousemen.



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The accident of the burning of the goods is not shown to have occurred through any negligence of the defendants, nor does it appear that, under the circumstances, the leaving of the goods on the platform, instead of placing them inside of the depot, was a culpable neglect of the duty of the defendants, especially as the plaintiffs, with full knowledge as to the situation of the goods, paid the freight thereon, without at all objecting to the goods remaining where they were then placed until the plaintiffs could receive them. Indeed, it is not clear that the goods were, after the plaintiffs paid the freight thereon, in the custody of the defendants as warehousemen at all. When the freight was thus paid, the goods then being delivered on the platform, the usual place of discharging goods, the plaintiffs were at liberty to remove them whenever they saw proper, and these facts would seem to amount to a delivery so far as to throw the risk of loss upon the plaintiffs, who thus permitted them to remain in that situation. By paying the freight upon the goods, thus placed on the platform ready for the plaintiffs, without making any arrangement as to the future custody or care of them, it would seem that the plaintiffs accepted the goods in the situation in which they were placed, and that the obligations of the defendants to take further charge of them ceased.

But whether this last view be correct or otherwise, we are of opinion that such negligence is not shown as would render the defendants liable as warehousemen; and that a new trial should be granted. The evidence, it may be remarked, is not at all conflicting, and taken all together falls short of making out such a case as would render the defendants liable.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*S. C. Willson* and *J. E. McDonald*, for the appellants (1).

*I. Naylor* and *J. Wilson*, for the appellees.

(1) Counsel for the appellants cited *Thomas v. The Boston, &c., Railroad Co.*, 10 Met. 472; *S. C. 1 Am. Railw. Cases*, 403; *Norway Plains Co. v. The Boston, &c., Railroad Co.*, 1 Gray, 263; *Stevens v. The Boston, &c., Railroad Co.*, *id.* 277.



SMITH v. THE INDIANA AND ILLINOIS RAILWAY COMPANY.

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v.  
THE INDI-  
ANA, &c.,  
RAILWAY CO.

An order of the board of directors of a railroad company, assessing the subscriptions of stock, certified by the secretary of the company, though not authenticated as the statute requires, is admissible in evidence in a suit upon a subscription, if no objection be made (and if no ground of objection was pointed out in the Court below, the case stands in the Supreme Court as if none was made); and when so admitted it is as conclusive of the matters contained in it, as if it had been properly authenticated.

In a suit upon a subscription of stock, to recover installments regularly assessed in accordance with the terms of the subscription, the subscriber is not entitled to notice of the assessment, or the time and place of payment, before suit brought.

The contract to pay by installments is, in such cases, a promise to pay on demand; and the demand involved in the commencement of the suit is alone sufficient.

APPEAL from the *Hendricks* Court of Common Pleas. *Tuesday, May 24.*

DAVISON, J.—The appellees, who were the plaintiffs, sued *Smith*, upon a subscription of stock to the articles of association of the railway company, he, *Smith*, being one of the original subscribers, and having subscribed three shares, 150 dollars. The instrument of subscription to which he signed his name, and which is set forth in the complaint, stipulates that the amount subscribed shall be payable to the company at such times and in such sums as its board of directors may, from time to time, order and require; but assessments on such stock shall not be made nor be payable oftener than once in sixty days, nor shall more than ten per cent. on the amount subscribed be made payable at any one assessment. It is averred that *Smith*, the defendant, although ordered, &c., by the directors to pay ten per cent. every sixty days, has refused, &c.

Defendant answered by a general traverse.

The Court tried the cause, and found for the plaintiffs 178 dollars. Over a motion for a new trial there was judgment, &c.

During the trial the plaintiffs proved that one *John S. Spann* was the secretary of the company, and then offered in evidence what purported to be a certified copy, given by



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the secretary, under the company's seal, of an assessment upon the stockholders, which reads thus:

"Office, *Indiana and Illinois Central Railway Company*.  
I hereby certify that the following is a correct copy of an order of the board of directors of the above company, passed *August 10, 1853*, viz.: 'Ordered that an assessment of ten per centum be made on all stock now subscribed, or hereafter to be subscribed, payable every sixty days, till the whole shall be paid.' In witness whereof, I hereunto set my hand, and affix the seal of the company, at *Indianapolis*, this 11th day of *January, 1855*.

[Signed] *John S. Spann*, Secretary."

The evidence thus offered, though resisted by the defendant, was admitted by the Court; but the ground upon which its introduction was resisted is not stated in the record, and hence the ruling upon the admission of it is not available in error. It is, however, contended that the copy certified by the clerk, when admitted, proved nothing; that it was no evidence of an assessment, because there is no statute making such certificate evidence. This position is not strictly correct. The certified copy, not being a sworn copy, was not authenticated as the statute requires, and was, on that account, objectionable. 2 R. S. p. 93, § 284. Still the copy before us purports to contain a legal order of the corporation, and no ground of objection to its admission as evidence having been pointed out in the Common Pleas, the case stands in this Court as if it had been admitted without objection, and the result is, the matters which it contains are just as effective and conclusive as if it had been verified in the mode prescribed by the statute. The order making the assessment must, therefore, be deemed in evidence before the jury.

But the appellants assume another ground upon which they seek a reversal. They say that the evidence proves no sufficient notice of the call upon the stockholders. *Edmund Clark* testified, "That he was an agent of the company for the collection of the stock subscribed; that notice of the order making the call was given by publication in a paper printed in *Danville*, and also by several



printed notices posted in divers places in the county of *Hendricks*; and further, that he called upon the defendant in person, in the summer of 1854, and requested him to pay the amount assessed against him, but he did not pay." This was all the evidence relative to the notice.

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Section 8, 1 R. S. p. 412, to which we are referred, provides that "It shall be lawful for the directors to call in and demand from the stockholders respectively, any sums of money by them subscribed, in such payments and installments as the directors shall deem proper, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made within thirty days after personal demand or notice requiring such payment shall have been made in each county through which such road shall be laid out in which a newspaper shall be published." The notice proved is obviously not within these statutory requirements. It is not shown when the newspaper publication was made; and for ought that appears it may have been subsequent to the commencement of the suit. And the personal request having been made in the summer of 1854, would not authorize the recovery, which is for the entire subscription, because, in view of the provisions of the order of assessment, not more than one-half the installments were due when the request was made.

But is section 8, to which we have referred, at all applicable to the case at bar? In terms, it applies only where the directors, in their order making the call, contemplate "a forfeiture of the shares of stock and all previous payments thereon." In that case, a personal demand, or a notice by publication, is required; but we know of no rule of construction by which that enactment can be held to require notice to a stockholder, prior to a suit against him for installments assessed and due on his subscription. It seems to follow—section 8 being inapplicable—that the installments, in this instance, were payable without any demand, other than that produced by the commencement of the suit. *Ross v. The Lafayette, &c., Railroad Co.*, is precisely in point. There, a subscription of stock con-



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tained provisions similar to the one before us, and the directors had, at a regular meeting, made a call on the stockholders, payable in installments. *Held*, that it was unnecessary to give the subscriber notice of the time and place of payment. 6 Ind. R. 297. See, also, *The N. A. and S. Railroad Co. v. McCormick*, 10 *id.* 499. These decisions rest upon the ground that the contract to pay by installments is, in effect, a promise to pay on demand; and that the demand involved in the suit itself was alone sufficient.

*Per Curiam*.—The judgment is affirmed, with 5 per cent. damages and costs.

*J. M. Gregg* and *H. C. Newcomb*, for the appellant.

*C. C. Nave*, for the appellees.

### EWING and Others v. GRAY and Others.

The statute provides for but one new trial, as a matter of course, in actions brought to recover real estate.

A deed fair and valid upon its face, is evidence of an honest transaction; and, until it is assailed by evidence, effective as proof, that it was obtained by the fraud of the grantee, he is not required to adduce any evidence in its support.

*A.* purchased a tract of land at sheriff's sale, and subsequently conveyed it to the wife of *B.* *Held*, that, although the circumstances of the case may tend to induce the conclusion that *A.* purchased at the instance and with the money of *B.*, yet the conveyance to the wife must be held valid, unless she is shown to have participated in some way in the fraudulent conduct of *B.*

An instruction should be based upon a state of facts assumed to have been proved by all the evidence in the case bearing upon it, and not by a part thereof only; and this rule is especially applicable to cases involving the question of fraudulent intent, which is generally a question of fact.

The wife is not bound by the acts and declarations of her husband unless she had knowledge of them.

Where the wife receives money during coverture, which is left under her control and management by the husband, and which they both treat as her separate property, the jury may, from these circumstances, find that she was the sole owner of it.



Where a wife, with money belonging in part to herself, and in part to her husband, for the purpose of delaying and defrauding his creditors, causes his lands to be bought in at sheriff's sale, and afterwards conveyed to herself, her title, thus acquired, is fraudulent and void as to such creditors.

The question of fraudulent intent in such cases is one of fact; but where the legal effect of an instrument, as it appears on its face, is to hinder or delay creditors, the Court will, in the first instance, pronounce it void.

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v.  
GRAY.

APPEAL from the *Ohio* Circuit Court.

Tuesday,  
May 24.

DAVISON, J.—*John Ewing, John Andrews, and Matthew H. Bevins*, brought an action in the *Ripley* Circuit Court against the appellees, who were the defendants, to recover a tract of land in *Ripley* county. There was a trial which resulted in a verdict for the plaintiffs. The defendants, as a matter of right, demanded a new trial, which was granted; and upon their motion, the venue was changed to *Ohio* county, in which, upon a second trial, the defendants obtained a verdict and judgment; whereupon the plaintiffs demanded a new trial, as a matter of right, which was refused, which refusal is assigned for error.

Anterior to the revision of 1852, a new trial could not be granted in any case without cause shown to the Court; but in the present code, there is a statutory rule of practice relative alone to actions for the recovery of real estate, which says: "The Court, rendering the judgment at any time within one year thereafter, upon the application of the party against whom judgment is rendered, his heirs, &c., and upon the payment of all costs, &c., shall vacate the judgment and grant a new trial. The Court shall grant but one trial, unless for good cause shown." 2 R. S. p. 167, § 601.

It is argued that the concluding branch of the section, namely, "the Court shall grant but one trial," when reasonably construed means, that only one new trial shall be granted to the same party. We think otherwise. The words used are sufficiently explicit, and plainly indicate a legislative intent that, under the enactment, not more than one new trial, as a matter of right, shall be granted in the same cause. We perceive no reason why the words quoted should not be held to mean what they literally im-



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port. When thus construed, they are obviously consistent with the entire section, and no injustice results; because the party who desires a new trial can attain his object upon good cause shown. The plaintiffs were not, in our opinion, entitled, as a matter of right, to a new trial.

The evidence shows that one *James Parker*, in *March*, 1855, recovered a judgment in the *Ripley* Circuit Court against *Henry L. Gray*, one of the defendants, for 1,307 dollars, upon which an execution issued. By virtue of that execution, the sheriff levied on, appraised, and sold the lands in dispute to the plaintiffs for 1,100 dollars, and in pursuance of the sale, made them a deed, under which they claim title, &c. It was further proved that in *April*, 1853, and before *Parker* recovered his judgment, one *Joseph Muir* obtained two judgments in the same Court against the said *Gray*, for the aggregate amount of 280 dollars. These judgments were without relief, &c. Executions were issued upon them, and levied on the same lands, as *Gray's* property, which, on the 18th of *March*, 1854, were sold by the sheriff to *Mary Gray*, the daughter of *Henry L. Gray*, for 320 dollars, which she then paid to the sheriff, who, on the day of sale, made her a deed. After this, on the 2d of *September*, 1854, *Mary Gray*, the sheriff's vendee, conveyed the lands to her mother, *Elizabeth Gray*, the wife of *Henry L. Gray*. Under this conveyance, *Elizabeth Gray*, who was a defendant, claimed title, &c.

The evidence being closed, the plaintiffs moved to instruct the jury as follows:

"If the plaintiffs have proved that *Henry L. Gray* was indebted, at the time of the sale on the *Muir* executions; that just before the sale he borrowed money for the avowed purpose of saving his property from such sale; and that the land in question was bid off by his daughter, who had no means of her own to pay therefor, and was shortly after conveyed by her to her mother, *Elizabeth*, who, with said *Henry* and the family, still occupies the same, as before; it behooves *Elizabeth Gray* to prove that the land was paid for with her own money; and without such proof the jury



may presume that the same was paid for by the money of *Henry L. Gray*; and if so, should find for the plaintiffs.”

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This instruction the Court refused, on two grounds:

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1. It assumes that *Elizabeth Gray* was bound by the acts and statements of her husband in her absence.

2. The law makes no presumption from the enumerated circumstances, but leaves the fraud to be found, or not, by the jury, from all the circumstances shown, the charge enumerating only a part of them.

The refusal of the instruction for the reasons given by the Circuit Court seems to be correct. The deed to *Elizabeth Gray* is, upon its face, evidence of an honest transaction, and until assailed by evidence, effective as legitimate proof that it was obtained by her fraud, she is not required to adduce evidence in its support. The circumstances detailed in the instruction may tend to induce the conclusion that the purchase at sheriff's sale was made at the instance of *Henry L. Gray*, and with his money; still the deed under which *Elizabeth* claims must be held valid, unless she has, in some way, participated in his fraudulent conduct. *Gatling v. Rodman*, 6 Ind. R. 289.

The second ground of refusal is also tenable. An instruction prayed should be based upon a state of facts assumed to have been proved by all the evidence bearing upon it, and not by a portion only of the evidence. 10 Ind. R. 87. The rule thus indicated is especially applicable to the case before us, where the question of a fraudulent intent is a question of fact, and not of law. 1 R. S. p. 303, § 21.—4 Ind. R. 388.—6 *id.* 176.

But the main error of the instruction is, that it assumes to bind *Elizabeth Gray* by the acts and declarations of her husband, when it does not assume that they were even within her knowledge. On this subject, however, the jury were correctly instructed. The Court, in its general charge, says:

“If you are satisfied from the evidence that there was a fraudulent combination between *Henry L. Gray*, his wife and daughter, or between him and his wife, to cause the land to be bought in by his means, and afterwards to be



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conveyed to her to defraud *Parker*, then his acts and declarations in carrying out the fraudulent plan are evidence against her."

The evidence further shows that *Elizabeth Gray*, in the year 1848, received 210 dollars, which was paid to her in part payment of a legacy bequeathed to her by her father. When this payment was made, there was still a balance coming to her; but the amount of the legacy was not shown, nor was there any evidence tending to show that she ever received, on account of the legacy, more than the 210 dollars. It was also proved that from the time she received the legacy, until the spring of 1854, she kept some money in a drawer, supposed, from the looks of it, to be 300 or 400 dollars, which she claimed as her own; and that on the morning of the day of the sale on the *Muir* executions, she handed her daughter, *Mary Gray*, the money, and directed her to bid off the land in question, which she, *Mary*, accordingly did, and with the money so handed to her paid for the same.

In relation to this evidence, the plaintiffs moved an instruction to the effect that the money received by *Elizabeth Gray* from her father's estate became the property of her husband; and that no agreement between them, without the intervention of a trustee, could make it her separate property. This was also refused, and, we think, correctly. The money, though bequeathed to *Elizabeth*, may, at the time it was received, have become the property of her husband. Still, the proposition "that no agreement between them, without the intervention of a trustee, could make it her property," cannot be maintained. A married woman may acquire a separate estate in personal property by gift from her husband, where the transaction is *bona fide*, and not intended as a cover for fraud. 1 *Bright's Husband and Wife*, p. 29, *et seq.* And in such case, the interest of the wife will be recognized and protected without the intervention of a trustee. 2 *Story's Eq. Juris.*, § 1380. This was the settled rule in equity, and is, of course, included in our new system of practice. But in reference to the point involved in the instruction the Court told the jury:



"If the evidence shows that the money when received, and afterwards, was treated by *Gray* and his wife as her separate property, and left under her control and management by her husband, it may be evidence tending to show that it was her separate property, and that she was the sole owner of it." This charge is consistent with the weight of evidence, and was, in our opinion, a proper direction to the jury.

Another instruction moved by the plaintiffs, and refused by the Court, reads thus:

"If, when the executions under which *Mary Gray* purchased were levied on the land, *Henry L. Gray* was insolvent, and owed *Parker* the debt for which his judgment was afterwards rendered; and if *Elizabeth Gray*, having 210 dollars of her own money, added the same to 110 dollars of *Henry L. Gray's* money, and employed their daughter, *Mary Gray*, to bid off the land with said moneys, for the purpose of protecting it from the existing debts of *Henry L. Gray*, she, *Elizabeth*, cannot hold the same against the plaintiffs, but at most can only have, by subrogation, a lien on the land for the money she actually advanced."

Admitting the facts assumed in this instruction, the plaintiffs were evidently entitled to a verdict. But we perceive no ground upon which *Elizabeth Gray*, having joined her husband in the purpose of defrauding his creditors, would be allowed to claim a lien upon the land for money advanced by her. In view of the case made by the proposed instruction, she must be deemed a fraudulent party; and to such a party the law extends no favors. But the refusal cannot be assigned for error; because the Court, in its charge, virtually covered the ground assumed in the refused instruction. The jury were thus instructed: "If the money with which the land was bought belonged in part to *Elizabeth Gray* as her separate property, and in part to *Gray*, and with the gross sum, she, *Elizabeth*, caused it to be bought in, and conveyed to her, for the purpose of hindering, delaying, and defrauding the creditors of *Gray*, *Parker* being one of them, her title, thus

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acquired, must be regarded as fraudulent and void as to such creditors, and it affords her no defense to the action." 5 Ind. R. 322. As we have seen, the statutory rule is that "the question of a fraudulent intent is a question of fact and not of law." It is true, there is an apparent exception to this rule. Where the legal effect of the instrument, as it appears on its face, would be to hinder or delay creditors, the Court may, in the first instance, pronounce it void. *Jenners v. Doe*, 9 Ind. R. 461. But here the rule obviously applies; because the deed set up in the defense, of itself, indicates a legal transaction, and whether it was or was not made to defraud creditors, is a pure question of fact. In this case, that question was, by the charge of the Court, fairly presented and properly left to the jury.

The evidence is, to some extent, conflicting; but it was for the jury to reconcile the conflict in accordance with its weight.

We are not inclined to disturb the verdict.

*Per Curiam*.—The judgment is affirmed with costs.

*P. L. Spooner* and *A. Brower*, for the appellants.

*I. W. Robinson* and *W. S. Holman*, for the appellees.

12	70
129	342
12	70
152	543

### CAMPBELL v. SWASEY and Others.

An attorney who appears as a mere *amicus curiæ*, has no right, in that character, to except to the rulings of the Court.

A party may enter a special appearance and move to set aside defective process, and will not thereby waive the right to object to such defects.

Where the sheriff's return to a summons is subscribed by his deputy, who does not use the name of his principal at all, but the record shows that the sheriff in person amended the return in open Court, and the defendant, without objecting to the return for that cause, entered a general appearance to the action, the return was held sufficient, although it should have been signed with the name of the sheriff by his deputy.

If several paragraphs of an answer amount to no more than a general denial of the complaint, which is also contained in the answer, they will be stricken out on motion.



Where judgment has been rendered for the right party, but for excessive damages, it is ground for a new trial, and can only be taken advantage of under the code, by that method.

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APPEAL from the *Switzerland* Court of Common Pleas.

Tuesday,  
May 24.

PERKINS, J.—Suit by the payees against the acceptor of a bill of exchange of the following tenor:

"\$343 04. Cincinnati, O., October 10, 1855.

Three months after date, pay to the order of *John Swasey & Co.*, at *Canal Bank*, in *New Orleans*, three hundred and forty-three dollars and four cents, value received, and charge the same to the account of

[Signed] Yours, &c., *M. B. Ross.*

To *John D. Campbell*, No. 833, *New Orleans, La.*

Accepted, *January 3*, [Signed] *John D. Campbell.*"

The writ in the case was issued to the sheriff, but the return of service upon it was as follows:

"Came to hand, *August 29*, 1856. Served as commanded, by leaving a copy of this writ at said *Campbell's* house, *September 13*, 1856. [Signed] *Ira Keeney*, Dep. Sheriff."

The defendant's counsel appeared as *amicus curiæ*, and moved to set aside the return as insufficient, without pointing out wherein.

The plaintiffs' counsel thereupon obtained leave of the Court for the sheriff to amend the return. He amended it as follows:

"Came to hand, *August 29*, 1856. Served as commanded, by leaving a copy of this writ at said *Campbell's* residence. *September 13*, 1856. [Signed] *Ira Keeney*, Dep. Sheriff."

The counsel then renewed their motion to set aside the return as amended, as insufficient, without pointing out wherein—which motion the Court overruled.

The attorneys of the defendant then entered an appearance for him, and filed his answer.

We will here dispose of the questions made upon the rulings of the Court touching the service of process.

It is doubtful whether a person who appears simply as *amicus curiæ*, can take an exception to the ruling of the



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Court upon any motion or suggestion made by him. Indeed we can see no reason why he should be allowed to do so. He acts for no one, but simply seeks to give information to the Court. The Court may, and sometimes does, of its own motion, ask of counsel information upon a point of doubt, and while a friend may advise, it is difficult to discover his right to compel a Court to an admission of its error in acting upon the advice.

In 2 Show. R., a counsel urged that he might, as *amicus curiae*, inform the Court of an error in proceedings, to prevent giving false judgment; but this was denied, unless the party was present. Taylor's Law Gloss. 44.

But there may be a special or partial appearance by a party, or by counsel for their client, to move to set aside defective process; and such appearance will not, as would full appearance, waive such defects. Ind. Dig. 126. On such special appearance a bill of exceptions might be taken.

The return to the writ, in this case, was informal. It should have been signed with the name of the sheriff, by Ira Keeney, deputy sheriff. *Patterson v. The State*, 10 Ind. R. 296.—*The New Albany, &c., Co. v. Grooms*, 9 Ind. R. 243. But counsel did not point out this as an objection. Had they, it would doubtless have been obviated by amendments; and further, the record shows that the return, as amended, was actually made by the sheriff. We think, under these circumstances, the informality in the return cannot operate to reverse the judgment. We proceed to other points.

Certain paragraphs in the answer were stricken out on motion. This act was excepted to. Many defects may exist in pleadings besides the six which, by statute, may be reached by demurrer. These must be objected to and removed upon motion. *Johnson v. The Crawfordsville, &c., Co.*, 11 Ind. R. 280. The paragraph stricken out in this case amounted to no more than the general issue. *The Indianapolis, &c., Co. v. Taffe*, 11 Ind. R. 458.

The cause was tried by the Court; finding for the plaintiffs for the amount of the note, costs of protest, interest,



and five per cent. damages; and judgment on the finding. No motion for a new trial was made, and no special exception was taken to any part of the finding of the Court.

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The item of damages in the finding was wrong. Such damages are not of common-law right, but depend upon statute. Perhaps a recovery may be had upon a foreign bill for reëxchange, where proof upon the point is made; but it is not necessary that we should here decide the point, as no such proof was made in this case. Byles on Bills, 329.—Sedgw. on Dam. 241. Our statute gives damages. Section 7, 1 R. S. p. 379, reads thus:

“Damages payable on protest for non-payment or non-acceptance of a bill of exchange drawn or negotiated within this state, shall be, if drawn upon any person at any place out of this state, but within the *United States*, five per cent.”

The bill in suit is not governed by our statute. It is an *Ohio* bill. We presume, in the absence of proof to the contrary, that the common law prevails in *Ohio*, as to the point in question (2 Phil. Ev., 4 Am. ed. 129); and had the attention of the Court been called to it by a motion for a new trial, it would, doubtless, at once have corrected its finding. This case happily illustrates the propriety of such motions. But the motion was not made, the objection was not taken below, and it is too late to raise it, for the first time, here. The policy of the law, and the rules of practice, should be such as will tend to produce correct judgments in the inferior Courts, and will make it the interest of counsel to aid the Court in arriving at such results.

If the face of the record made it apparent that judgment was rendered for the wrong party, the point would be good on appeal without an exception having been taken; but excessive damages, where the judgment is for the right party, is ground for a motion for a new trial, and should be taken advantage of, under the code, by that method. 2 R. S. p. 117.



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v.  
STIPE.

*Per Curiam.*—The judgment is affirmed with 1 per cent. damages and costs.

*T. Gazlay and C. Gazlay*, for the appellant.  
*S. C. Stevens*, for the appellees.

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SCOTT v. STIPE and Others.

Where a grant of land was made to the use of the trustees of a certain church and their successors in office forever, in consideration of the respect of the grantor for the institution of Christianity, and that the church might have a suitable place for erecting a house of worship, upon a condition subsequent that a church should be erected upon the land within a reasonable time, and forever thereafter used as a house of worship, pursuant to the intention of the grantor, and after the church had been erected the property was sold, and converted to secular uses:

- Held*, 1. That the trustees had no power to sell the land without the consent of the grantor, or his heirs, he being dead, and the members of the church.  
2. That the members of the church might have enjoined the transfer; and they might have had the conveyance set aside.  
3. That the misappropriation of the property granted was a breach of the condition which worked a forfeiture of the estate; and the grantor or his heirs could recover back the land in a suit at law or in equity.  
4. That condition broken gave right of entry.

Tuesday,  
May 24.

APPEAL from the *Montgomery* Circuit Court.

PERKINS, J.—Suit to recover possession of real estate. Demurrer to the complaint sustained. Judgment for the defendant.

It appears by the complaint, that on the 4th day of *January*, 1834, *James Scott, jr.*, and *Mary*, his wife, executed a deed for the piece of land sought to be recovered in this suit to "*Guardis R. Robins, Christopher Fullender, and James A. Thompson*, trustees of the *Bethel Presbyterian Church*, the members of which live in the said counties of *Boone* and *Montgomery*, in the state of *Indiana*, and their successors in office." The consideration of the deed is stated to be, "the respect the grantors have for the institu-



tion of Christianity, and that the said *Bethel* church may have a suitable place for erecting a house of worship." The deed further recites that, "it is understood to be a part of the agreement between the parties, that at any time when the house which may be erected on said tract of land shall not be occupied by the Presbyterians, any minister of the Gospel, of the Baptist or Methodist churches, shall have the privilege of using it as a house of worship; and also, if the neighborhood around should wish to build a school-house on said lot, the privilege shall be granted."

The grant is, "to the use of the said trustees of the *Bethel* church, and their successors in office forever."

It further appears by the complaint, that the grantees erected a house for worship, on the lot, which was, for some years, thus used by the said *Bethel* church; but that, on the 24th day of *March*, 1853, the then trustees of that church, sold the lot and the house of worship erected upon it, to *John Stipe*, who thenceforward occupied the same as a store-room, and for other business of a secular character.

Upon these facts, it is very evident that the lot in question was granted in trust for a pious or charitable use, and that the trustees had no power to sell it without the consent of the grantor, or his heirs, he being dead, and the members of the *Bethel* church. See *The Town of Pawlet v. Clark*, 9 Cranch, 292 (3 Cond. R. 418), where the learning upon grants of this description is collected by Judge STORY. See, also, *Sweeney v. Sampson*, 5 Ind. R. 465, and cases cited. The members of the *Bethel* church might have caused such a transfer of the property to be restrained by injunction; and might have had the conveyance set aside after it was made. See *Wallace v. The Associate Reformed Church, &c.*, 10 Ind. R. 162; 2 Cruise on Real Prop., Greenl. ed., p. 46, note. But the grant in this case was not only in trust; it was also upon a condition subsequent that a church should, within a reasonable time, be erected upon the lot, and forever thereafter be used as a house of worship, pursuant to the intention of the grantor. The cases of *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 *id.* 306; *Clapp v. Stoughton*, *id.* 463; and

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May Term, 1859. *Sinclair v. Comstock*, Hars. (Mich.) R. 404, are in point to this proposition. See 1 Hill. on Real Prop., pp. 348 to 351.

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v.  
ROCKWELL.

The misappropriation of the property granted—its diversion to secular uses—was a breach of the condition; and the breach of the condition worked a forfeiture of the estate, and rendered it subject to be recovered back by the grantor, or his heirs, in a suit at law, or in equity. Condition broken gave right of entry. *Leach v. Leach*, 10 Ind. R. 271.—S. C. 4 *id.* 628.—*Hefner v. Yount*, 8 Blackf. 455.—*Cross v. Carson*, *id.* 138.—*Nicoll v. The New York and Erie Railroad Co.*, 2 Kern. 121. See *Hunter v. The Trustees of Sandy Hill*, 6 Hill (N. Y.), 407.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for further proceedings.

*I. Naylor*, for the appellant (1).

*S. C. Willson* and *J. E. McDonald*, for the appellees.

(1) Counsel for the appellant cited the following authorities:

Breach of condition is a forfeiture of the estate, by which it reverts to the grantor, his heirs or devisees, free from intermediate incumbrances by lease, descent, grant, or devise; and the grantor has a right to reënter, or to bring his action to recover the estate. *Gray v. Blanchard*, 8 Pick. 284.—*Jackson v. Topping*, 1 Wend. 388.—*Jackson v. Pike*, 9 Cow. 69.—*Hayden v. Stoughton*, 5 Pick. 528.—*Police Jury v. Reeves*, 18 Martin (La.), 221.—3 Denio. 334.—4 Kent's Comm. 125, 126.—*Cross v. Carson*, 8 Blackf. 138.—*Hefner v. Yount*, *id.* 455.—*Jackson v. Chrysler*, 1 Johns. Cases, 125.—*Nicoll v. The New York and Erie Railroad Co.*, 2 Kern. 121.

### JOHNSON and Wife v. ROCKWELL and Others.

12 76  
149 158

If a wife, by an antenuptial contract, secure to her separate use the property possessed by her at the time of her marriage, and have the same conveyed to a trustee, subject to her unlimited control; and, after marriage, she exchange a portion of that property for real estate, taking a conveyance to herself, separately—such real estate becomes her separate property, alike subject to her control, at least in equity, as was the property given in exchange for it.



A deed cannot be avoided on the ground of mental incapacity in the grantor, produced by intemperance, unless it appear that at the time he executed the deed he was incompetent to perform the act.

A deed by husband and wife, good in point of form, and properly acknowledged, and in its operative parts conveying a fee simple, is not vitiated by a concluding clause assuming to state the legal effect of the conveyance as to the wife—such clause being mere surplusage.

A wife may, with the consent of her husband, convey her separate real property.

In transactions between husband and wife touching the separate estate of the latter, she, *prima facie*, will be viewed in the light of a *feme sole*; and as such, she may dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part; and such disposal of it will preclude her right to charge his estate, after his death, with what he so received. The conveyance, in such case, must be made through a third person.

The conveyance of real property by an infant is not void—it is only voidable; and where the contract for the conveyance is with an adult, such adult is bound, and cannot avoid the contract on account of the infancy of the other contracting party.

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#### APPEAL from the *Carroll* Circuit Court.

Wednesday,  
May 25.

PERKINS, J.—Petition by *Baalis Johnson* and *Sarah Ann*, his wife, for partition of lots 98, and 3 and 4, in *Lafayette*. The petition is against *Rockwell*, *Hamer*, and *Johnson*. The facts are somewhat numerous and complicated, and present several questions. The proceeding was instituted in *November*, 1848.

It appears that, by an antenuptial contract, said *Sarah Ann Johnson* secured to her separate use the property of which she was possessed before and at marriage. The property was conveyed to a trustee, subject to her unlimited control. A portion of that property she exchanged, after she was married, for lots 3 and 4, above mentioned. The conveyance of them was to her separately, and not jointly with her husband. They became, therefore, her separate property, alike subject, at least in equity, to her control, as was that which was given in exchange for them. *Glancy's Husband and Wife*, 272, 612.

It appears that lot 98, above mentioned, was the property of *Mary E. Hamer*, a daughter of said *Sarah Ann Johnson* by a former husband, and who, while an infant, married *Jonathan R. Rockwell*. Afterwards, and while said *Mary E.* was still an infant, she and her husband jointly conveyed



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lot 98 to *Francis V.* and *Baalis D. Johnson*, infant children of appellants, in consideration of the conveyance by said appellants, *Baalis Johnson*, and *Sarah Ann*, his wife, of said lots 3 and 4 to said *Jonathan R. Rockwell*, and the sum of 500 dollars paid to said *Baalis Johnson* by said *Mary E. Hamer* (then *Rockwell*).

On the 26th of *December*, 1846, *Mary E. Hamer* (then *Rockwell*) died childless, being the day on which she arrived at majority. She left, as her only heirs, *Sarah Ann Johnson*, the female appellant, *Thomas F. Hamer*, a brother, and *Ruth Ann Clark*, a niece.

Said *Thomas F. Hamer* released his interest to said *Sarah Ann Johnson*. He denied the validity of the deed, on the ground of mental incapacity, produced by intemperance; but the Court ruled against him, and rightly. *Lewis v. Baird*, 3 McLean, 56.—*Achey v. Stephens*, 8 Ind. R. 411. It was not made to appear that, at the time he executed the deed, he was incompetent to perform the act. It should have thus appeared.

*Baalis D. Johnson* died leaving no issue, but leaving a sister and appellants, his heirs.

*Ruth Ann Clark* died leaving no issue, but leaving as her sole heir, *Thomas F. Hamer*.

It thus appears that the parties to this suit have become the only ones interested in the property involved.

The Court below set aside the deeds from *Johnson* and wife to *Rockwell*, and from *Rockwell* and wife to *Johnson*.

We will examine the rulings upon these points.

*First.* Of the deed of *Johnson* and wife to *Rockwell*. It is in the following form: "This indenture, made this third day of *April*, A. D. 1846, between *Baalis Johnson* and *Sarah Ann Johnson*, his wife, of, &c., of the first part, and *Jonathan R. Rockwell*, of, &c., of the second part, witnesseth: That the parties of the first part (*Johnson* and his wife), do hereby, in consideration of the sum of nine hundred dollars, grant, bargain, sell, and convey unto the party of the second part, his heirs and assigns forever, all those certain tracts or parcels of lands, &c., viz.: lots three and four in *William Barbee's* addition to the town of *Lafayette*, to



have and to hold the premises and appurtenances above described to the said party of the second part (*Rockwell*), his heirs and assigns forever. And the said *Baalis Johnson*, and *Sarah Ann*, his wife, for themselves, &c., covenant and agree with the said *Jonathan R. Rockwell*, his heirs, executors, administrators, and assigns, that they (the grantors) are lawfully seized in fee of the premises granted; that they are the true and lawful owners of the same, and that they, for themselves, their heirs, &c., will warrant and forever defend the premises above described, with their appurtenances, unto the party of the second part (*Rockwell*), his heirs and assigns forever, against all claims of any person or persons whatever; and the said *Sarah Ann*, wife of the said *Baalis*, hereby relinquishes all her right, title, and claim to dower, in said premises."

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The deed is executed and acknowledged by *Baalis* and *Sarah Ann Johnson*. The acknowledgment is in the usual form, stating the separate examination of the wife, the explanation of the deed, the acknowledgment of its free execution for the uses and purposes expressed, and that she thereby relinquished all right, &c., of dower.

It is contended that this deed is void, and conveyed nothing.

The deed is good in point of form—it is sufficient upon its face. In its operative parts it conveys the fee simple. The concluding clause, assuming to state the legal effect of the conveyance, as to one of the grantors, is immaterial, mere surplusage, and does not vitiate the deed. The use of the word dower is a mere misnomer, both in the deed and acknowledgment, as is evident from the whole instrument, and could not mislead any one, nor limit the legal operation of the deed. *Ostrander v. Spickard*, 8 Blackf. 227.

It was competent for the wife, with the consent of her husband, to make a conveyance of her separate real property. *Reese v. Cochran*, 10 Ind. R. 195.—R. S. 1843, p. 417.—Reeve's Dom. Rel., p. 112. "In transactions between husband and wife, relative to the separate estate of the latter, she, *prima facie*, will be viewed in the light



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of a *feme sole*, and, as such, be competent to dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part." 2 Bright on Husband and Wife, p. 257. The conveyance must be made through third persons. *Resor v. Resor*, 9 Ind. R. 347. Since the wife may appoint and dispose of her separate property as a *feme sole*, so she may give it to, or permit her husband to receive it, which will preclude her right, after his death, to charge his estate with what he so received. Bright, *supra*, p. 259. See Reeve's Dom. Rel., p. 98, *et seq.*; 1 Dan. Ch. Pr. (Perk. ed.) 121. In this case, there is no proof of fraud. The consideration paid was adequate, and went to the uses designated by Mrs. Johnson.

*Secondly.* Of the deed from Rockwell and wife to the infant children of the said Baalis and Sarah Ann Johnson. The questions upon this, are varied from those upon the deed of Johnson and wife, in this particular only, viz., that Mrs. Rockwell was an infant at the time the deed was made.

Upon this point, counsel for Rockwell argue thus:

"The deed from Rockwell and wife to the children of the complainants is not deficient in form or substance. The code of 1843, which governs the case, (p. 417, § 17,) provides that the joint deed of the husband and wife, upon complying with the provisions of § 40, of the same chapter, should be sufficient to convey and pass the real estate of the wife, but not to bind her to any contract or estoppel therein. In the execution of the deed, the provisions of § 40 were strictly complied with. The statute refers to all married women, making no discrimination between adults and minors, but, alike, places their real estate under the guardianship of the husband. That such was the intention of the legislature, becomes the more manifest from the fact that § 41 of the same act provides that a married woman, under the age of twenty-one years, cannot release dower in her husband's lands, without the sanction of her guardian or father, and omits to apply the same rule where the lands of the wife are conveyed. The stat-



ute is clear, and not open to a construction different from that above given to it. Very plainly, *ita lex scripta est.*"

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This argument is plausible—the position assumed may be correct; but there is another ground on which we prefer to rest the case.

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The conveyance of real property by an infant, is not void; it is only voidable. *Pitcher v. Laycock*, 7 Ind. R. 398. And where the contract for the conveyance is with an adult, such adult person is bound, and cannot avoid the contract on account of the infancy of the other contracting party. *Reeve's Dom. Rel.* 343. Where the contract is one absolutely void, neither party is bound.

Here the contract was only voidable, and is now, in reality, sought to be avoided by the adult party; for the conveyance of the *Rockwells*, now sought to be avoided, was executed in fulfillment of a contract with said *Sarah Ann Johnson*.

Again: *Mrs. Johnson*, the mother of the infant grantor, approved of the conveyance when made by the infant, and would be estopped now, as heir, to seek to avoid it on account of the infancy.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

*R. C. Gregory, R. Jones, J. M. La Rue, and W. O. Deming*, for the appellants (1).

*J. Pettit, S. A. Huff, and Z. Baird*, for the appellees (2).

(1) The following is an abridgment of the argument of counsel for the appellants:

Both parties complain of the decree. On the part of the plaintiffs, we propose presenting several views of the questions presented by the record, as between them and *Rockwell*, and discussing separately the questions between them and *Hamer*. The plaintiffs complain of so much of the decree as directs the money specified by it to be paid to *Rockwell*, as also the making these several sums liens. So much of the decree as sets aside the deeds from the plaintiffs for lots 3 or 4 to *Rockwell*, and from *Rockwell* to the minor children of the plaintiffs, we think correct, for the following reasons: *Mrs. Johnson* had a separate property, in exchange for which she received the conveyance for lots 3 and 4 from *Barber*, and these lots, in equity, are regarded as separate property, and the power of *Mrs. Johnson*, or her husband, over the same, is identical with the power either had over the separate property, in exchange for which



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they were obtained. Clancy's Husband and Wife, 272, 612, and cases cited. The husband did not become tenant by the curtesy of these lots. He had no interest therein, and could convey none. Nothing could then pass by the deed to Rockwell, unless it was Mrs. Johnson's title. The deed is in the usual form of a conveyance of the husband's realty with full covenants. The *testatum* clause is as follows: "In witness whereof, the said *Baalis Johnson* and *Sarah A. Johnson*, who hereby releases her dower in said premises, have," &c. So the acknowledgment purports to be by the wife an acknowledgment of her release of dower, and nothing more. The deed, upon its face, does not purport to be a conveyance of the wife's general or separate property.

The intent of parties might have been different from that expressed by this deed, but the intent of a married woman cannot, even in equity, be regarded as carried into effect; nor can the operation of a conveyance of her separate property be extended or limited except by the terms of her deed. It cannot operate by way of estoppel, as the covenants and warranties do not bind her. *Aldridge v. Burlison*, 3 Blackf. 201.

In *Mayo v. Keaster*, 2 McCord, 137, a deed similar to this was held to convey nothing, as it purported to be, and was acknowledged as, a release of dower in the husband's lands, and could not be held to convey the absolute title of the wife. A like decision has been made in *Connecticut*. If this deed is totally inoperative, as we think it clearly is, it should be set aside as a cloud on the title. *Hays v. Hays*, 2 Ind. R. 28. The deed from Rockwell and wife to the children of the plaintiffs, is exactly of the same character, and would have been inoperative to convey the title of Mrs. Rockwell to lot 98, for the same reason. But it was absolutely void as to her, from the fact that she was an infant at the time of its execution (having died upon the day she arrived at full age), and could not have any operation as to Rockwell, for no issue was born of the marriage, and he, of course, never had any title whatever.

The deed for lots 3 and 4 should be set aside for another reason. It was made under a mistake, which would require its cancellation, even if Mrs. Johnson had been discoverd. She executed it for the purpose of settling a liability against her husband, and to make a provision for her infant children by having vested in them the title to lot 98. This purpose was not, and could not be, accomplished by giving them Rockwell's covenants or warranties instead of the absolute title. She executed her conveyance under the full assurance that by it she accomplished this double purpose; but the consideration in great part moving her to this act failed, owing to the mistake as to the effect of the conveyance to her children. It was a mistake as to a most material and substantial part of the transaction, requiring its entire rescission. 1 Story's Eq. Juris., § 141.

If either of the foregoing views of the case is correct, the decree is right so far as it declares these deeds canceled, but is wrong in the manner of taking the account and declaring the existence of liens. The account should have been taken by charging Rockwell with the rents of lots 3 and 4 from the date of the conveyances to the final decree, deducting the 80 dollars paid by him, and all outlays for repairs, taxes, &c., together with the rents of lot 98 from the same time, up to the death of his wife. This would have left a balance of several hundred dollars in favor of Mrs. Johnson, which he should have been decreed to pay her for her separate use. The account between Rockwell and Mrs. Johnson should have been taken, without reference to any supposed or



real liability on the part of her husband to *Rockwell*. If such liability exists, and could be adjudicated in this proceeding (both of which propositions we doubt, for reasons stated below), it should have been adjudicated between them alone, and *Baalis Johnson* directed to pay any sum found due from him.

We are at a loss to conceive by what process of reasoning the Court below could have arrived at the conclusion that it could appropriate the rents of lots 3 and 4 (the separate property of a married woman) to the payment of a debt of her husband, or decree such debt of the husband, or any part of it, a lien on the general or separate real property of the wife. We suppose there could be no decree as between *Baalis Johnson* and *Rockwell*; that the state of the pleadings would forbid it, if the right existed; that whatever right *Rockwell* might have, as the administrator of his wife, to her personally not reduced to possession during her life, he can have no right to it except he has assumed that character; and until he becomes such administrator, he has no more right to a decree for the payment of the money of his wife in the hands of any one, than a mere stranger.

It is proper that we should present still another view of the branch of the case we have been discussing, asking for it the consideration of the Court, if the deed to *Rockwell* can be held to have conveyed Mrs. *Johnson's* title to lots 3 and 4. The evidence fully establishes that Mrs. *Rockwell* had contracted, long before her marriage, with Mrs. *Johnson* (her mother) for a conveyance of these lots 3 and 4, for the same consideration that the conveyance was afterwards made, and had taken possession of them in pursuance of the contract (if you can call an agreement between an infant and a married woman a contract); and had both been competent to contract at the time of her marriage, Mrs. *Rockwell* was the equitable owner of these lots. Being such owner, after her marriage (even had she been of full age), she could not have converted her equitable title into a legal title in her husband, so as to have bound either herself or her heirs. The conveyance having been made at a time that, by reason of her coverture (as well as her infancy), she could give no binding or legal assent, the conveyance vested in *Rockwell* (her husband) the bare legal title, which he held in trust, and these lots must be regarded for all purposes, in equity, as the general property of the wife, by whom, or by whose heirs, the trust can be enforced.

*Moore v. Moore*, 12 B. Mon. 651, is directly in point. There were several matters in controversy in that case, but so far as it bears upon this case, the facts were as follows: The guardian of *Martha Moore*, during her minority, invested some of her money in the purchase of a tract of land, adding some of his own funds to complete the payment, and took a conveyance to himself. After her arrival at full age, she married, and her guardian conveyed the tract of land to herself and husband jointly, the husband promising to pay the sum he had advanced. She died without issue, and her heirs at law claimed the land. In discussing this branch of the case, the Court says, p. 663: "It remains that we consider whether the complainants were entitled to a decree for a portion of the land conveyed by *George Moore* to *Noah S. Moore* and his wife, the said *Martha*, jointly, after their intermarriage. This is the tract of land which was purchased by *George Moore*, whilst he was the guardian of the said *Martha*, at her instance, and for her. It was paid for chiefly by the means of *Martha*, but partly with the means of *George Moore*. He says that he conveyed the land to *Noah S. Moore* and the said *Martha* jointly, because he be-

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lied the conveyance to her could be made in no other way. *Noah S. Moore* charges that the reason assigned by *George Moore* for making the conveyance to himself and wife jointly, is not the true one, but that he made it in that way at 'the earnestly expressed wishes and desires of the said *Martha*,' and because he had undertaken to pay that portion of the purchase-money which had been advanced by the said *George Moore*, out of his own means.

"There is no proof in regard to *Martha's* wishes and desires to have this land jointly conveyed to herself and husband; and if there were, it would not avail anything. True, we might and do feel a desire that her wishes, if she expressed any in reference to her husband, could be complied with; but unless the law will give him this land, any feeling which we might have, cannot be gratified. *Noah S. Moore*, being a joint grantee with his wife, and being, as he says, seized of the entirety during their joint lives, claims the whole of this land by survivorship. Had they been jointly entitled, he would, as survivor, have a right to the land—the statute of this state abolishing the *jus accrescendi* between joint tenants, not applying to estates granted jointly to husband and wife. But we are of opinion they were not jointly entitled to the land. Before *George Moore* made the conveyance to *Noah S.* and wife, she was the equitable owner of the land—as much the equitable owner as she would have been the legal owner, had the conveyance, before that time, been made to her alone. It is clear that, in that state of the case, she could have made no contract or co-tenancy with her husband or with *George Moore*, by which to divest herself of her title; and it is equally clear to our minds, that no wish or desire which she might have expressed to *George Moore* or her husband, or to both, and thereby procuring a joint conveyance to herself and husband, would enable her to invest her husband with a joint interest in the land. The general principle of law is, that a wife cannot so contract as to bind herself; her contracts are void. She is presumed, in most cases, and the case under consideration comes not within any exception to the rule, to act under the power of the husband, and by his coercion. And if she cannot make a contract which would bind her, it is evident she cannot be bound by an act done merely by request—a *fortiori* she cannot be bound where it was done, as in this case, as far as the proof shows, without even a request. If she was not bound, neither are her heirs. It is laid down in *Story's Equity*, p. 617, 'that a married woman is disabled from making any contract respecting her real property, either to bind herself or to bind her heirs; and that this disability can be only overcome by adopting the precise means allowed by law to dispose of her real estate; as in *England* by a fine, and in *America* by a solemn conveyance.' So far, therefore, as *Noah S. Moore* was the recipient of the mere legal title to this land, he held the same in trust for his wife, and now holds the same in trust for her heirs."

And it was decreed that the husband should convey this tract of land to the heirs of his wife, and pay them the rents from the death of his wife, and that the heirs repay the guardian the sum he advanced to complete the purchase.

Adopting this view of the case, it should have been decreed that *Rockwell* convey the lots 3 and 4 to the heirs of his wife; and, after taking the account in the same manner as before indicated for taking it between him and Mrs. *Johnson*, that he should pay the balance to the heirs of his wife; and that he be released from his covenants in the deed to the plaintiffs' children; but that the agreed price of that lot, with interest, should, in favor of those children, be de-



clared a lien on lot 98, and it sold to pay the lien, unless it was paid by the heirs of Mrs. Rockwell.

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We now propose examining the other branch of the case in which Mrs. Johnson and the defendant Hamer are alone interested. He, by his answer, admits he executed the quitclaim to Mrs. Johnson, as charged, on the 25th day of January, 1847, but charges that this conveyance was obtained from him for a grossly inadequate consideration, by fraudulent representations, when he was drunk, &c. Is the alleged gross inadequacy of price made out? It is proved that the whole property described in his deed is of large value, but there is no proof showing the value of his interest in it. There is no proof showing he had the smallest interest, at the time, in any of the property described in his deed, except as heir at law of Mrs. Rockwell, and as such heir, he was entitled to one-fourth of her realty. The record does not show that she owned any realty at her death except the parcel of school-land purchased for 200 dollars, and whatever interest she had in the town lots described. Whether Hamer had retained his interest, as one of her heirs, in this parcel of land, up to the date of his deed, is not certainly shown. If he had not parted with it, how could Rockwell and Baalis Johnson, as well as Barroll (Rockwell's attorney), have doubted whether there was any interest in Hamer? If he was the owner of one-fourth of this, and conveyed it, that interest could not have been worth more than from 50 to 75 dollars. What interest his deed conveyed in lots 3 and 4 and 98, described in the bill, we cannot pretend to say. If the conveyances of these lots are canceled, his deed conveyed only the one-fourth of lot 98, worth from 75 to 100 dollars. But the title to this was by no means unclouded. In the state of the title and possession, his right in this lot could only be asserted by a litigation, which would probably cost as much as his interest was worth. If the deeds are not canceled, still he had no interest whatever in lots 3 and 4, unless Rockwell is held to be a trustee as to them for the heirs of his wife, in which event the interest conveyed by him in these lots would turn out to be worth some 250 dollars, and the interest conveyed by him in lot 98, of little or no value. No prudent man, at the time of his conveyance, would have purchased Hamer's interest in these lots, and paid for it 50 dollars, being fully advised of all the facts—knowing such interest could not possibly be worth more than 300 dollars—would probably prove worth less than 100 dollars—and was utterly worthless, except as the basis of a tedious, uncertain, and expensive litigation. The dealing, as shown by the answer itself, and especially as shown by the deposition of Rockwell, was for an uncertain and contested interest that might prove of greater or less value than the price fixed. It was a chancing bargain, and cannot be affected by the interest conveyed proving of greater or less value than was attached to it at the date of the conveyance. *Merrivether's adm'r. v. Heron*, 8 B. Mon. 162.—*Jasper v. Hamilton*, 3 Dana, 280. For these uncertain interests, Hamer received 100 dollars, in money and property, as he alleges. Is this "such inadequacy of price as shocks the senses, and, at first blush, shows a fraud has been perpetrated?" Story's Eq. Juris., § 244, and on.—*Roe ex dem. Weirick v. Ross*, 2 Ind. R. 99. Indeed, was not the price paid more than any prudent man, having no connection with the title, would have paid for such a contested claim? The allegations in Hamer's answer, of fraudulent representations and concealments, are utterly unsupported by proof. There could have been no concealment, as all the conveyances were of record, and Hamer's relationship to Mrs. Rockwell,



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her age at her death, and his rights as one of her heirs, must have been as well known to him as to any other person.

*Hamer* alleges this conveyance was procured while he was drunk. The only evidence tending to prove the allegation is, that he was in the habit of becoming intoxicated; but there is not the slightest proof that he was intoxicated at or about the time he made this deed, or at any time while the negotiation lasted, which must have been several days, from *Rockwell's* history of it. What facts must be shown to avoid a deed on account of the drunkenness of the grantor, is determined in *Harbison v. Lemon*, 3 Blackf. 51, and *Jenners v. Howard*, 6 *id.* 240. Even had *Hamer* proved the allegations of his answer, (all of which are denied by the plaintiffs' replication,) he could have no relief; because he did not offer to return what he received, but something else which he chose to consider an equivalent. Or had the consideration for his deed been wholly a money one, and his tender proper, still he must have brought the money tendered into Court, to have entitled him to a rescission of his contract.

(2) An elaborate brief was filed by counsel for the appellees; but only a mutilated copy came to the Reporter's hands, from which the argument could not be gathered.

### RENO v. THE STATE on the relation of ACKERETT.

Wednesday,  
May 25.

ERROR to the *Jackson* Circuit Court.

*Per Curiam*.—This case is similar to, and falls within the decision of, a case between parties of the same name, reported in 6 Ind. R. 308.

The judgment is affirmed, with 10 per cent. damages and costs.

*F. Emerson*, for the plaintiff.

*W. T. Otto*, for the state.

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### PATTERSON v. THE STATE on the relation of NEFF.

Complaint averring that *M. and P.*, on, &c., at *Greene* county, executed before *C.*, a justice of the peace, a recognizance, in the sum of 100 dollars, conditioned that *M.* should appear before said justice, at his office in said county, on, &c., to answer to "a charge of obtaining money by false pretense," and



abide, &c.; that, by mistake, the venue of the recognizance was laid in *Sullivan* county, but that it sufficiently appeared from the papers that the obligation was for appearance in *Greene* county, which defendant well knew; that on, &c., the justice caused *M.* to be three times called, but he made default; that he caused *P.* to be called, who failed, &c.; and thereupon judgment of forfeiture was rendered, &c., which judgment is still in force, &c. Answers were filed, to which demurrers were sustained, and no exception taken.

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*Held*, 1. That the case stands as if no objection had been made to the sufficiency of the complaint in the Court below.

2. That the complaint is sufficient to bar another suit for the same cause of action.
3. That the recital in the recognizance, of the offense charged, was sufficient.
4. That §§ 12, 13, 14, 2 R. S. p. 499, and § 49, *id.* p. 366, construed together, mean that a recognizance, to operate as a lien on lands, must be certified and recorded, &c.; but that it may be the foundation of an action, without having been so certified and recorded; that the action is in the nature of an action of debt, and is brought upon the recognizance as upon any other contract.

#### APPEAL from the *Greene* Circuit Court.

Wednesday,  
May 25.

HANNA, J.—The complaint avers that one *McAlister* and *Patterson*, on, &c., at said county of *Greene*, executed, &c., before one *Cushman*, a justice, &c., a recognizance, &c., in the sum of 100 dollars, &c., conditioned that said *McAlister*, should appear before the said justice, &c., at his office in said county, on, &c., to answer “a charge of obtaining money by false pretense,” and abide, &c.; that, by mistake, the venue of said recognizance was laid in *Sullivan* county, but that it sufficiently appears from the papers, &c., that said obligation was for the appearance in *Greene* county, which was by the defendant well known; and that on, &c., the justice caused the said *McAlister* to be three times called, but he made default; that he then caused *Patterson* to be called, &c., who failed, &c., and thereupon a judgment of forfeiture was rendered by said justice, &c., all of which appears, &c.; that said judgment of forfeiture is still in force, &c.; wherefore, &c.

Answers were filed, to which demurrers were sustained, but no exception was taken. Judgment for the appellee.

No exceptions having been taken to any rulings of the Court below, upon demurrers to pleadings, the only questions now presented for our consideration are those at-



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We must treat this case as if no objection was made, in the Court below, to the sufficiency of the complaint. In that view of the question, we are of opinion that the complaint is sufficient to bar another suit for the same cause of action.

But it is assigned for error, and urged in argument, that the recognizance, which was the foundation of the suit, and made a part of the complaint, was void, because it provided that *McAlister* should be forthcoming "to answer a charge of obtaining money under a false pretense;" that the language used does not import an indictable offense, and, therefore, the material statements necessary, under the statute, to make out such offense, should have been embodied in the recognizance—such as, that the money was designedly obtained under false pretenses, with intent to defraud another, &c. If this reasoning is correct, the facts and circumstances, including the false pretenses used, would have to be set forth with as much particularity in a recognizance, as in an indictment. We are of opinion that any omission of recital, in the recognizance, is cured by § 49, 2 R. S. p. 366, which is as follows: "No action upon a recognizance may be defeated for any defect of form, or any omission of recital, condition, or undertaking therein, or neglect of the clerk to indorse or record it; but the recognizers are bound," &c. Even without this statute, it appears the recital would have been sufficient. *The State v. Hamer*, 2 Ind. R. 371.

It is insisted that, as the complaint does not aver that there was a continuance, as provided under § 14, 2 R. S. p. 499; nor that the justice indorsed on the recognizance that it was forfeited and filed with the clerk, &c., as provided in § 15, *id.*; it is, therefore, so insufficient that the judgment should be reversed.

We think that §§ 12, 13, 14, 15, p. 499, and § 49, p. 366, 2 R. S. when construed together, mean, that a recognizance, to operate as a lien on lands, must be certified and record-



ed, &c.; but that it may be the foundation of an action, without having been so certified and recorded. Perhaps, under the former practice, a *sci. fa.* could not have issued from the Circuit Court until the recognizance had been recorded; but this is an action, in the nature of an action of debt, on the recognizance, as on any other contract.

As to the point raised on the question of continuance, it has been already settled in the case of *The State v. Inman*, 7 Blackf. 225.

*Per Curiam*.—The judgment is affirmed, with 3 per cent. damages and costs.

*D. M' Donald* and *A. G. Porter*, for the appellant.

*H. C. Newcomb* and *J. S. Tarkington*, for the state.

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RIDDLE  
v.  
PARKE.

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RIDDLE v. PARKE.

Where the complaint in replevin alleges ownership and right to possession, in the plaintiff, possession by the defendant without right, and unlawful detention from the plaintiff; and the defendant answers, denying the detention, and setting up property in a stranger: *Held*, that there is a good issue without reply—the answer denying the detention, a material allegation of the complaint, and argumentatively denying property in the plaintiff by alleging property in a stranger.

APPEAL from the Dearborn Circuit Court.

Wednesday,  
May 25.

HANNA, J.—This was an action by *Parke* against *Riddle*, to recover a certain article of personal property, to-wit, a piano forte.

The complaint alleges that the plaintiff is the “owner and entitled to the possession” of the property which the defendant has “possession of without right, and unlawfully detains from the plaintiff.”

The defendant answered that he “does not unlawfully detain the said piano, but that the same is the property of one *John S. Detweiler*, and that,” &c., the same was levied upon as his property by *Riddle*, as sheriff, &c.



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v.  
PARKE.

There was no reply filed to the answer.

The evidence disclosed the fact that the instrument had been sent by the plaintiff to his daughter, the wife of *Detweiler*, but whether as a gift absolutely, or merely to be used, and the title to remain in the plaintiff, was a disputed question, and does not clearly appear.

The Court, sitting as a jury, found for the plaintiff; and as the evidence tends to sustain that finding, we cannot disturb it, in accordance with repeated decisions upon that point.

It is insisted that, as there was no reply filed, the trial was without an issue, and was, therefore, a mistrial.

It will be observed that the defendant denies, directly, a material averment in the plaintiff's complaint, to-wit, that he unlawfully detains, &c., and in making that denial, he gives the reason, namely, that the property belonged to *John Detweiler*, and was, by the defendant, as sheriff, levied upon as such. In giving this reason, we think he argumentatively denies another material allegation of the plaintiff's complaint—that he was the owner, and entitled to the possession. If we are correct in this, the issue would be complete without a reply. That this view of the law is correct, we believe is established by the following authorities:

“If the defendant confesses the caption, and pleads property in *J. S.*, this is in bar of the action, as well as in abatement; for this not only shows that the plaintiff had no right to a deliverance of the goods, but also, that he has no cause to complain of the caption and detention against his pledges, which is in bar of the action. And this is not only a justification to cover the defendant from damages, but for the return of the beasts, for he doth not admit property in the plaintiff, but disaffirms it, and therefore, the beasts ought to come back to the defendant, who ought to retain them against every one but *J. S.*” *Wilk. on Repl.* 48.—*Gilb. on Repl.* 168.

“Where the defendant pleads property in a stranger, or in the defendant, these pleas disaffirming the property of the plaintiff, are, by verdict, found for the defendant, or



upon demurrer adjudged for him; in these cases the defendant shall have return," &c. Wilk. on Repl. 95.—Gilb. on Repl. 319. See, also, *Gentry v. Bargis*, 6 Blackf. 261. *Per Curiam*.—The judgment is affirmed with costs. *J. Ryman* and *T. Gazlay*, for the appellant. *P. L. Spooner* and *A. Brower*, for the appellee.

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1859.

CARLISLE  
v.  
WILKINSON

### CARLISLE v. WILKINSON and Wife.

At common law, a default could not be set aside at a term after the one at which judgment was rendered.

By § 99, 2 R. S. p. 48, it is discretionary with the Court to relieve a party from a judgment by default, or refuse to do so, at any time within a year from the rendition of the judgment.

Where a discretionary power is vested in an inferior Court, there must be a plain case of abuse of that discretion, to justify interference by the Supreme Court.

An application for relief from such a judgment, made at the first term after a default, and based solely upon the affidavit of the defendant simply showing the employment of an attorney and his neglect to defend, was held to have been correctly overruled.

And a second application, made at the next succeeding term, based upon the first affidavit and an affidavit of the attorney that he did not understand that he was employed, although the defendant might have understood that he was employed, was held to have been correctly overruled, for the reason that the affidavit of the attorney came too late—that ordinary diligence required that it should have been filed at the preceding term.

*Quere*, whether, if both affidavits had been filed on the first application, it would have been error to overrule it; and whether an application can, in any case, be renewed upon an additional showing, after having been once made and overruled.

APPEAL from the *Morgan* Circuit Court.

WORDEN, J.—Complaint by the appellees against the appellant, for the assignment of dower in certain real estate. Judgment by default for the plaintiffs below.

At the next term of the Court after the judgment was entered, *Carlisle* appeared by his attorney, and moved to set aside the judgment. He filed an affidavit, setting out

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156	536



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1859.

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matters relied upon as a defense to the plaintiffs' claim of dower, and stating "that immediately on the service of process on him in this case, he went to *Lucian Barbour*, an attorney at law, of *Indianapolis*, and of that Court, and employed him to attend to the defense of this case, he having always been the attorney of affiant, and supposed he had so done until after the adjournment of the last term of this Court, when the affiant says he believes the said *Barbour* neglected it; and affiant says if the judgment which has been rendered against him in this case, is set aside and opened, and he is permitted to file his answer herein, he can and will establish all the aforesaid facts," &c.

The motion was overruled, and exception taken.

At the next term of the Court, and before the expiration of a year from the rendition of the judgment, the motion was again made, and the affidavit of said *Lucian Barbour* was filed, in support of the motion, as well as said affidavit of *Carlisle*. The affidavit of *Barbour* states, "That, in the month of *September* or *October*, in the year 1854, *Carlisle*, the defendant, came to the law-office of the deponent and *Albert G. Porter*, with whom the deponent was then practicing law in partnership, and advised with them as his attorneys, relative to a suit then recently commenced against him in the *Morgan* Circuit Court by the plaintiffs, for a dower right in certain mill property situated in *Waverly*, in *Morgan* county. The deponent did not then know when the next term of the Court would be held in *Morgan* county, and so informed Mr. *Carlisle*; and as both the deponent and said *Porter* had ceased to practice law in said *Morgan* Circuit Court, they made no contract with said *Carlisle* to attend to the case at *Martinsville*; but they advised with him as to his defense to the action. The deponent further says, that said *Carlisle* left the office at that time, without anything being said about any employment of any person to attend to the case in *Morgan* county; and as this deponent and said *Porter* were attending to said *Carlisle's* law business generally in *Marion* county, the said *Carlisle* seems to have left the office with



the expectation that the deponent and said *Porter* would attend to the case aforesaid, probably not understanding the rule that the firm of *Barbour* and *Porter* had adopted, not to attend to law business in any Court out of the county of *Marion*, without a special employment and undertaking to that effect. The deponent further says, that he has no recollection whether anything was said in said conversation with said *Carlisle*, as to the rule of this deponent and said *Porter* that they would not attend Court out of the county of *Marion*, without a special undertaking to do so, nor does he know that said *Carlisle* knew of it, nor whether said *Carlisle* had, at any other time, been involved in any law business out of *Marion* county."

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V.  
WILKINSON.

The motion was again overruled, and exception taken; and the correctness of these rulings is the only question presented by the record.

At common law, a default could not be set aside at a term after the one at which judgment was rendered. *Blair v. Russell*, 1 Ind. R. 516.—*Gullett v. Housh*, 5 Blackf. 33.

The statute relied upon, authorizing such proceeding, is as follows:

• • • "The Court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and at any time within one year relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any of the proceedings." 2 R. S. p. 48, § 99.

By the above provision, it will be seen that it was in the "discretion" of the Court below to relieve the party from the judgment, and permit him to plead, or to refuse the application. Where a discretionary power is vested in an inferior Court, there must be a plain case of the abuse of that discretion, in order to justify the interference of this Court. *Morris v. Graves*, 2 Ind. R. 354.—*Detro v. The State*, 4 id. 200.—*Heberd v. Myers*, 5 id. 94.

The application, made at the first term of the Court after the default, was based solely upon the affidavit of *Carlisle*. That affidavit, so far as the point now under



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consideration is concerned, simply shows the employment of an attorney to defend the cause, and a neglect by that attorney to do so. The ruling of the Court on this application, if not clearly right, is far from being clearly wrong. It seems to us that something more than mere neglect on the part of the attorney should be shown—some good reason or excuse for the failure. The negligence of his attorney is the negligence of the party, and it should be shown to be “excusable”—otherwise, it is not within the terms of the statute.

But at the next term of the Court, the affidavit of Mr. *Barbour*, the attorney alleged to have been employed, was filed, and the motion to set aside the default renewed. The affidavit of Mr. *Barbour* puts an entirely different phase upon the matter. Mr. *Barbour* did not understand that he was employed at all in the cause, and of course could have been guilty of no negligence in not attending to it. The affidavits, taken together, show about this state of facts:—*Carlisle*, supposing he had employed *Barbour* to defend the suit, gave himself no more trouble about it; while *Barbour* not being employed, or not understanding himself to be employed, of course paid no attention to it whatever, and in the meantime default was entered.

It is insisted that the application to set aside the default having been once made and overruled, could not be repeated; that such an application is similar to applications for a change of venue. *Millison v. Holmes*, 1 Ind. R. 45.

It is unnecessary to decide, in the present case, whether the above proposition is, in all respects, correct, as we think the affidavit of *Barbour* came too late. There is no reason shown why it could not have been procured and filed at the time *Carlisle's* was filed. Ordinary diligence, we think, required this to be done. One vacation intervened between the default, and the first application to set it aside, during which, for aught that appears, Mr. *Barbour's* affidavit might have been taken, and filed in support of the motion. This, however, was not done, but the appellant chose to rest the motion on his own affidavit. Having failed in this, he procured the affidavit of *Barbour*, and



at the next term, renewed his motion upon the two affidavits. Under the circumstances, we think it clear that no error was committed in overruling the motions.

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Whether or not, had both affidavits been filed on the first application, it would have been error to overrule it; or whether an application can, in any case, be renewed upon an additional showing, having been once made and overruled, are questions which we do not decide.

*Per Curiam*.—The judgment is affirmed with costs.

*R. L. Walpole, D. Wallace, and J. Coburn*, for the appellant.

*D. M' Donald*, for the appellees (1).

(1) *Mr. M' Donald*, for the appellee, in the course of a lengthy argument, insisted that on the overruling of these motions, no error can be assigned. He argued thus :

At the common law, a motion to set aside a default cannot be made after the term at which the default is rendered. Therefore, the only ground on which these motions could have been made, is a provision of the code, which reads as follows :

"The Court may, also, in its discretion, allow a party to file his pleadings after the time limited therefor, and at any time within one year relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect." 2 R. S. pp. 48, 49.

Here is a discretionary power vested in the Circuit Court; and the question is, can any exercise of it be assigned for error?

We understand the rule to be, that where a statute creates a discretionary power, the doings of a Court in relation to it can never be assigned for error; and the reason seems to be that the inferior Court, by the very words of the statute, may or may not, act as it deems most proper.

Where a statute provides that a Circuit Court might, "at its discretion," change the venue, this Court has held that a refusal to change the venue cannot be assigned for error, "although a legal cause for filing the petition exist." 5 Blackf. 576. Where a statute (R. S. 1843, p. 1001) provided that the Circuit Court, "in the exercise of a fair and sound discretion, may grant" a change of venue, this Court has held that a refusal to do so could not be assigned for error; because, as Judge PERKINS said, "whether the change should or should not be granted, was a matter entirely in the discretion of the Circuit Court." 8 Blackf. 282. In *Hubbard v. The State*, 7 Ind. R. 164, and in *Hall v. The State*, 8 id. 440, the same doctrine is held, and upon the same reason. These cases as to a change of venue, being on statutes giving a discretionary power, seem to us fully in point. Surely it cannot be argued that a statute authorizing a Court, "in its discretion," to set aside a default, is to be construed differently from a statute authorizing the same Court, "in its discretion," to order a change of venue.

The same doctrine has been repeatedly held by the Supreme Court of the



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*United States*. And it is upon this principle that, in that Court, a wrongful refusal to grant a new trial cannot be assigned as error. That Court has always held that the granting or refusing of a new trial is a matter solely in the discretion of the Court; and that therefore a decision on the question cannot be revised on error. *Henderson v. Moore*, 5 Cranch, 11.—*Marine Ins. Co. v. Young*, *id.* 187.—*Barr v. Gratz*, 4 Wheat. 220.—*The United States v. Daniel*, 6 *id.* 542. On the other hand, the Supreme Court of *Indiana*, at an early day, held that a new trial is, "in many cases, demandable as a matter of right;" and that, upon this principle, error may be assigned touching a motion for it. 1 Blackf. 21.

It has been repeatedly held in the Supreme Court of the *United States*, that a motion to set aside a default is addressed to the discretion of the Court; and that, therefore, upon a disallowance of the motion, error cannot be assigned. *The United States v. Evans*, 5 Cranch, 280.—*Welsh v. Mandeville*, 7 *id.* 152. It is true, that in these cases the motion was to reinstate a cause. But as these motions were made by the plaintiffs after being nonsuited, and as a nonsuit always supposes a default on the part of the plaintiff to appear and prosecute, they were substantially motions to set aside defaults. And it is surely the same whether such motions come from the plaintiff or defendant, who, having failed to appear, is defaulted. To the same effect appear to be the cases of *Wall v. Wall*, 2 Har. and Gill, 79; *Romaine v. Norris*, 3 Halst. 80; *Chase v. Davis*, 7 Verm. R. 476; *Edgell v. Bennett*, *id.* 534; *The State v. Ware*, 10 Ala. R. 814.

The case of *Garner v. Crenshaw*, 1 Scam. 143, is exactly in point. That was a motion by the defendant to set aside a default. And the Court said: "Apart from the merits of the application to the Circuit Court, it will be perceived that an application to set aside a default is addressed to the sound legal discretion of the Court; and that no writ of error will lie to correct the erroneous exercise of this power. We are not only satisfied that the power was discreetly exercised in this case, and conformably to its justice, but that the refusal to set aside the default cannot be assigned for error."

Will we, however, be told that, according to several cases in our own Supreme Court, the abuse of a discretionary power may be assigned for error? We have carefully examined the decisions of that Court on this question, and we have found none analogous to the case under consideration. The only cases relating to the matter which we have been able to find, are *Gordon v. Spencer*, 2 Blackf. 286; *Morris v. Graves*, 2 Ind. R. 357; *Detro v. The State*, 4 *id.* 201; *Heberd v. Myers*, 5 *id.* 95. Besides the above cases, we have found none in our Supreme Court referring at all to this subject. In each of these cases, there is a mere dictum that, unless in clear cases of abuse, the Court will not interfere with the exercise of discretionary power. And we believe that there is no case in our Supreme Court in which a reversal has occurred by reason even of an abuse of discretionary power in the Court below. Without such a case, we submit that it cannot be truly said that the point in question has been decided by this Court.



## McENDREE and Another v. McENDREE.

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v.  
McENDREE.19 97  
147 60

Where a part of the appellants are barred by the statute of limitations, their names may be stricken from the record, and the cause may proceed as to the parties not barred.

A decree against an infant will not be reversed simply because the evidence is not in the record.

Where an agreement of parties would seem to dispense with the necessity of evidence, and the record contains none, it may be inferred that there was none.

Where the record contained nothing which would seem to empower a guardian to admit a case against his infant ward, a decree founded upon such an admission will not be sustained.

APPEAL from the *Johnson* Circuit Court.Wednesday,  
May 25.

DAVISON, J.—This was a bill in equity by the appellee, who was the plaintiff, against *Richard McEndree, John McEndree*, and *Abner Hanks*. The object of the suit was to subject certain real estate to the payment of a debt alleged to be due to the plaintiff. *Hanks* was defaulted. *Richard* and *John McEndree*, being minors, appeared by guardian *ad litem*, who answered in the usual form. At the *September* term, 1845, as appears by the record, the depositions then filed in the cause were withdrawn, and leave was given to take depositions; but it does not appear that others were ever taken or filed. At the *March* term, 1846, the following agreement appears to have been made between the parties:

"It is agreed that the land described in the bill be sold, and the plaintiff, out of the proceeds thereof, be paid 70 dollars; and that the residue of the proceeds be paid over to *Richard* and *John McEndree*; and that they pay the cost," &c.

The Court, at the same term, rendered a decree in accordance with the agreement. Defendants appeal to this Court.

The record before us was issued on the 28th of *March*, 1855, and filed here on the 30th of that month. For error, it is averred that the decree was rendered against *John* and *Richard McEndree*, they being infants, without any proof



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v.  
McENDREE.

whatever of the allegations in the bill. To this, the appellee answered, 1. In the proceedings and decree there is no error. 2. That *Richard* and *John McEndree* arrived at full age after the expiration of three years from the rendition of the decree, and that this appeal was not taken until the expiration of three years from the time they so arrived at full age. Reply in denial of the second paragraph. Upon the issue thus made, it was proved that *Richard* was 21 years old in *September*, 1848, and that *John* arrived at the same age in *March*, 1853. It follows that when the record in this case was issued and filed, an appeal, as to *Richard*, was barred by the statute; but as to *John*, it was not barred. R. S. 1843, p. 631.—2 R. S. p. 160, §§ 561, 562. The latter section provides that the Supreme Court, upon being satisfied that the statute of limitations has barred a part, only, of the appellants, may strike their names from the record and proceed, &c., as to those appellants who are before the Court. The name of *Richard McEndree* is, therefore, stricken from the record.

In reference to the assigned error, it may be noted that we have recently decided that a decree against an infant will not be reversed simply because the evidence is not in the record. 9 Ind. R. 481. But in this case, it is insisted that the record itself shows that there was no evidence before the Court. This position is at least plausible. The parties having agreed that the land be decreed to be sold; that the plaintiff, out of the proceeds, receive his demand; and that the residue be paid over, &c.; there would seem to have been no necessity for evidence, and it may be inferred that there was none. Indeed, the agreement, on the part of the guardian, was, in effect, an admission of the truth of the averments in the bill; and the action of the Court in passing the decree, is in strict accordance with the agreement. There is, however, nothing in the record that would, in any event, allow the guardian thus to admit a case against the infants. A decree, founded on such an admission cannot, therefore, be maintained. 8 Blackf. 300, 301.—1 Ind. R. 374.

*Per Curiam.*—As to the defendant, *John McEndree*,



the decree is reversed. Costs here against the appellee. Cause remanded, &c.

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1859.

*G. M. Overstreet* and *A. B. Hunter*, for the appellants.

MAXWELL  
v.

*F. M. Finch*, for the appellee.

MULLIS.

### MAXWELL and Another v. MULLIS and Others.

This case is precisely like *McGregor et ux. v. Axe et ux.*, 10 Ind. R. 362.

APPEAL from the *Orange* Circuit Court.

Wednesday,  
May 25.

*Per Curiam*.—This was a bill in chancery, filed by the appellants against the appellees, to enjoin the collection, and procure the cancellation, of a certain promissory note, on the ground of usury.

There was a decree enjoining the collection of a part of the note; but the appellants insist that a greater portion of it should have been enjoined, while the appellees complain, by way of cross-error, of the action of the Court in enjoining any part of it.

The cause was set down for hearing, and heard, at the *April* term, 1853; but the Court not then being sufficiently advised, took it under consideration until the *September* term of the same year, when there were a finding and a decree as above indicated.

At the time of the finding and judgment, the revised code had taken effect, and by that the cause must be governed. No motion for a new trial was made by either party, nor was any exception taken to any ruling of the Court; hence, no question is presented by either party for our consideration.

This case cannot be distinguished from *McGregor v. Axe*, 10 Ind. R. 362.

The judgment is affirmed with costs.

*J. Baker*, *D. M' Donald*, and *H. P. Thornton*, for the appellants.



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THE STATE V. FREEMAN.

THE STATE  
v.

FREEMAN.

12	100
135	290

12	100
171	70
171	71

At common law, it is for the Court, and not the jury, to decide whether, under the circumstances of the case, a confession of guilt is admissible; but the statute allows all confessions, save those produced by threats, to be given in evidence.

The words addressed to the accused must involve a threat; and the motive to confess, produced thereby, must be such as to so operate on his mind as to render it doubtful whether the confession is worthy of credit.

Prosecution for stealing three twenty-dollar gold-pieces. The defendant, upon his arrest, was told that there was "no use in denying it; that the gold-pieces had been found where he passed them; that he had better own up to it." He then confessed the larceny. *Held*, that this language was that of inducement, and that, under the statute, the confession was admissible in evidence.

Wednesday,  
May 25.

APPEAL from the *Grant* Circuit Court.

DAVISON, J.—Indictment charging the defendant with having feloniously stolen three twenty-dollar gold-pieces, of the value of 20 dollars, the property of one *John Lowe*. Plea, not guilty, and verdict for the defendant. The state appeals upon a reserved case.

The record shows that during the trial, one *William Kann* was introduced, who testified thus: "I was a constable. On the 10th of *March*, 1858, I proceeded, in company with said *Lowe*, to arrest the defendant. We met him on the road. I told him I had a warrant for his arrest. He appeared to be a little agitated. He asked what it was for. *Lowe* then told him it was for stealing his, *Lowe's*, money. Defendant denied it. *Lowe* replied that there was no use in denying it; that he had found where he, defendant, had passed two of the twenty-dollar gold-pieces, and could prove it. I then told the defendant that he had better just own up to it. This conversation was had in a positive tone, but in a mild and calm manner, not boisterous or commanding."

At this stage of the testimony, the Court, at the instance of the defendant, refused to permit the witness to disclose any confessions made to him by the defendant on that occasion, in reference to his guilt, upon the ground



that such confessions were made under the influence of fear produced by threats. To this ruling the state excepted; and thereupon she offered to prove by the same witness, that defendant, about an hour after the above conversation, while in witness's custody, on their way, by themselves, to *Marion*, of his own accord, without anything further having been said by witness to defendant in relation to the larceny, entered into a conversation about it, and made a full disclosure of all the circumstances, fully admitting and confessing to witness that he, defendant, had committed the larceny as charged in the indictment. This offer was resisted by the defendant, and refused by the Court, and the state excepted, &c.

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v.  
FREEMAN.

At common law, it is for the Court, and not the jury, to decide whether, under the particular circumstances of the case, the confession be admissible. But in reference to this rule, we have a statute which says:

"The confession of the defendant, made under inducements, with all the circumstances, may be given in evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony." 2 R. S. p. 373, § 93.

This enactment modifies essentially the common-law rule; because its effect is to allow all confessions of guilt, save those produced by threats, to be given in evidence to the jury. And unless, in this instance, the confession was so produced, it should have been admitted.

What shall be considered such a threat, has been illustrated in a variety of cases. Thus, saying to a prisoner that it would be worse for him if he did not confess, is sufficient to exclude a confession. So, a confession induced by saying, "Unless you give me a more satisfactory account, I will take you before a magistrate;" or by saying, "That unfortunate watch has been found; and if you do not tell me who your partner was, I will commit you to prison," cannot be given in evidence. 2 Russ. on Crimes, 831, and cases there cited. The result of these illustrations, and others that might be noted, seems to be, that



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the words addressed to the accused must involve a threat; and the motive to confess thereby produced, must be sufficient so to operate on his mind as to render it doubtful whether the confession should be relied on as worthy of credit. 2 Greenl. Ev., § 220.

If this exposition be correct, and we think it is, the confession in this case was plainly admissible; because the evidence fails to prove any threat, or statement involving a threat, in any degree calculated to move the defendant to confess his guilt. He was told that there was no use in denying it; that the gold-pieces had been found where he passed them; and that he had better own up to it; but this is simply language of inducement; and though it may have induced the confession, still, a confession so induced is admissible under the statute.

*Per Curiam.*—The appeal is sustained with costs.

*H. S. Kelly and J. M. Harlan*, for the state.

### JOHNSON and Another v. CHAMBERS and Another.

Where goods were ordered to be forwarded by the first boat leaving *P.* for the *Wabash*, it was held, that the direction meant no more than that they should be forwarded at the earliest opportunity.

A document of another state not admissible in evidence by the common law, will be rejected where the statute of the foreign state is not produced, though such a document of this state is admissible by our statute.

The Courts cannot take notice of the statutes of a foreign state changing the common law.

Wednesday,  
May 25.

APPEAL from the *Tippecanoe* Court of Common Pleas.

PERKINS, J.—The appellees brought an action for goods sold and delivered, against the appellants. The complaint contained only a single paragraph, in the form of the common count, accompanied by a bill of particulars. The defense was a denial of all the allegations in the complaint. On this issue there was a trial by a jury, verdict for plain-



tiffs, and judgment on the verdict, over a motion for a new trial, which was overruled by the Court, and to which the proper exception was taken by the appellants.

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The evidence and instructions all appear in the record by bills of exceptions. The facts are these: "The appellees, in the spring of 1856, were wholesale dealers in glass, residing at *Pittsburgh*, in the state of *Pennsylvania*. The appellants were hardware merchants, residing and doing business at *Lafayette*, in the state of *Indiana*. About the 12th day of *March*, 1856, *Johnson*, one of the firm of *Johnson* and *Patton*, called on the appellees, at their place of business in *Pittsburgh*, and verbally ordered fifteen half-boxes of glass, to be shipped to the appellees at *Lafayette*, by the first steamer that should leave *Pittsburgh* for the *Wabash* river. At the time this order was made, the *Ohio* river, at *Pittsburgh*, was closed with ice. On the 25th of *March*, 1856, the river was open for navigation; and on the 27th, the steamboat *Latrobe*, freighted at *Pittsburgh*, left that port for the *Wabash* river, but the glass which had been ordered by the appellees, was not shipped on the *Latrobe*, which was the first boat. The appellants knew of the arrival of the *Latrobe*. On the 2d of *April*, 1856, the glass was put on board the *Gov. Powell*, the second steamboat that left *Pittsburgh* for the *Wabash* river. The *Powell* left *Pittsburgh* on the 2d of *April*, and owing to the difficulties of the navigation in the *Wabash* river, got no farther than *Terre Haute*, where she discharged her cargo, including the glass consigned to the appellants, leaving it in the hands of a warehouseman, and returned to the *Ohio* river. At the time the glass was put on board the *Powell*, the appellees took from her commander a bill of lading, which, with the bill of goods made out by the clerk in the house of the appellees, they forwarded by mail, to the appellants. In *May* or *June*, following, the appellees received a letter from the warehouseman at *Terre Haute*, informing them that the glass had been stored with him. In *August*, following, the appellees drew a draft on the appellants, for the amount of their bill, payable in *September*, six months from the time the glass was ordered. This draft was pre-



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sented to the appellants on the 16th of *September*, 1856, and they declined accepting it, at the same time writing to the appellees as follows: "Your draft on us was to-day presented for our acceptance, and, as we have not yet received the glass shipped us on the *Gov. Powell*, we declined accepting it. The *Gov. Powell* has never been at our wharf, although we did hear that she was in the *Wabash*. If you can ascertain the disposition the boat has made of her cargo, we shall be pleased to hear from you." This letter was received by the appellees, at *Pittsburgh*, about the 20th of *September*, 1856. It was in proof that the appellees used exertions to ship the glass on the *Latrobe*, and that her agent refused to receive the freight, because her full freight had already been engaged before the appellees applied. *Ward*, a witness for the appellants, testified that he accompanied *Johnson* to the house of the appellees, and introduced him to them, and was present when he gave the order for the glass; and that *Johnson* was particular to direct them to send it by the first steamer.

The appellees used due diligence to ship by the *Latrobe*. It did not receive general freight. The *Powell* was the first boat that did.

We think it plain that it was not a condition of the contract of purchase of the goods in question, that they should be sent by the first boat leaving *Pittsburgh* for the *Wabash*. It was not then known to either party which boat, of all those on the waters, would leave first. It might happen to be a worthless and entirely unsafe one. The direction meant no more than that the goods should be forwarded at the earliest suitable opportunity. But, in fact, the goods were sent by the first boat, within the direction. The *Latrobe* had been previously chartered by a few shippers, for whom, alone, she did business, and was not open to general freight. The *Powell* was the first boat, thus open, that left *Pittsburgh* the spring of the purchase of the goods, the price of which is sued for.

But it is contended that the contract of sale is void by the statute of frauds, and hence, that a suit cannot be maintained upon it.



It is admitted by the counsel for the appellees, that the delivery of the goods to the carriers was not a delivery to the purchaser, whereby the case would be taken out of the statute. See 2 Pars. on Cont. 327 to 330; Brown on the Statute of Frauds, §§ 328, 329, 330. But it appears that the contract was made in *Pennsylvania*, while no law of that state is pleaded and proved in the case.

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And the question is, shall the common law, or the statute of this state, be applied in determining the case?

When the question has arisen, in this state, upon the admission of a document from another state, as evidence, which, by the common law, would not be admissible, while, by our statute, such a document of this state, would be admissible, the Court has applied the common law, and rejected the evidence, where the statute of the other state has not been produced. *Wright v. Bundy*, 11 Ind. R. 398, and cases cited.—Ind. Dig. p. 424, § 26.

The same rule has been adopted in cases involving the validity of contracts. See *Titus v. Scantling*, 4 Blackf. 89; *Blystone v. Burgett*, 10 Ind. R. 28; and, still more in point, *Trimble v. Trimble*, 2 Ind. R. 76. See, also, *Doe v. Collins*, 1 Ind. R. 24.

There is some reason for the rule of presumption as to the common law. The Courts will take notice of the facts that our ancestors came to this country from *Great Britain*, bringing that law with them; that that law, so far as applicable in this country, was in force in the thirteen original states, except as modified by the statutes thereof; that it was declared in force in the territories of the north-west by the ordinance of 1787, &c.

The Courts cannot take notice judicially of statutes of the states which may have changed the common law. See *Doe v. Collins*, *supra*.

Nevertheless, the subject is one not clear of difficulty, and doubts have been expressed as to the rule that should govern.

We have not now time to examine the subject at large, nor do we mean to lay down a universal rule. The case at bar falls within those last cited above, and will be de-



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cided upon them. We place it upon the common law. By that law, a parol contract for the sale of goods, to any amount, was valid. *Sutton v. Sears*, 10 Ind. R. 223.

*Per Curiam*.—The judgment is affirmed, with 1 per cent. damages and costs.

*S. A. Huff, Z. Baird, and J. M. La Rue*, for the appellants (1).

*R. C. Gregory, H. W. Chase, and J. A. Wilstach*, for the appellees (2).

(1) Counsel for the appellants made the following argument:

Upon the facts [as stated *supra*], the Court instructed the jury, at the request of the appellees:

1. That a delivery to a common carrier is a sufficient delivery to the vendees.
2. That steamboats employed in carrying goods from one place to another, are common carriers.
3. That if the appellants were notified of the shipment of the glass by the *Gov. Powell*, and made no objection, and gave no notice of their dissent until September 16, 1856, knowing that the *Latrobe* was the first steamer leaving Pittsburgh, and that she was at Lafayette in April, then they waived their right of having their goods shipped on the first boat.
4. The jury may presume from the letter of September, 16, 1856, that the defendant waived all objections as to the goods not being shipped on the first boat, if written with a knowledge that the *Gov. Powell* was not the first boat leaving Pittsburgh for Lafayette.

The appellants requested the Court to give the following instructions:

1. That if the defendants ordered the goods shipped on the first boat, which was not done, and the goods have never been received by the defendants, the jury should find for the defendants.
2. Ordering goods to be shipped by the first boat, gave the plaintiffs no right to ship by any other boat; and, if the plaintiffs shipped contrary to the directions of the defendants, they cannot recover, unless they prove a delivery of the goods by them.

The first of the instructions requested by the appellants, the Court refused to give as requested, but modified it by adding the words, "unless the defendants waived a compliance with their order, or ratified the acts of the plaintiffs in shipping by another boat." The appellants excepted to the refusal of the Court to give the first instruction as requested, and also to the modification made to it.

The second instruction requested by the appellants was refused, and the refusal excepted to.

To the several instructions given by the Court, at the instance of the appellees, exceptions were taken in due form.

We insist that this judgment should be reversed. The verdict is wholly unsupported by evidence—is contrary to the law applicable to the facts proven—



and is the result of the misdirection of the Court below in the instructions given to the jury, at the instance of the appellees. May Term,  
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All that is proven of the sale and delivery of property, by the appellees to the appellants is, that *Johnson*, one of the firm of *Johnson and Patton*, called at the store of the appellees at *Pittsburgh*, and verbally ordered fifteen half-boxes of glass to be shipped to the appellants, at *Lafayette*, by the first boat leaving *Pittsburgh* for the *Wabash* river. Not one single other act or circumstance is shown relating either to a sale or delivery of the glass. When the order was made, no act was done to identify the particular boxes of glass to be shipped, no separating the articles from the other articles of merchandise in the establishment of the appellees, nothing that would have enabled *Johnson and Patton* to reach the articles ordered, by process of law, to obtain possession of them, nor anything that would have placed the goods at their risk, in the possession of the vendors. It was not a sale of goods such as would have been binding at the common law; and the defense against the action, to be successful, needs not the interposition of any statute of frauds. The complaint is for property sold and delivered; and is not to be sustained by evidence which neither shows a sale or delivery. "At common law," says *Parsons*, "if the seller makes a proposition, and the buyer accepts, and the goods are in the immediate control of the seller, and nothing remains to be done to identify them, or in any way to prepare them for delivery, the sale is complete." *Parse* on Cont. 320. Under this rule there was no contract, binding on the parties, at the common law, made at *Pittsburgh* when *Johnson* was there; for the goods were not identified, nor prepared for delivery until after he had left *Pittsburgh*. The date of the invoice forwarded to the appellants was *April 2, 1856*. *Johnson*, who it is shown, gave the verbal order, was in *Pittsburgh* on the 12th of *March, 1856*, and only remained there one day. This makes it evident that, when *Johnson* left *Pittsburgh*, the goods ordered remained to be identified and prepared for delivery. They were thus identified and prepared on the 2d of *April, 1856*, for this is the date at which the appellees fix the sale. We do not pretend that the date of this invoice is material for any other purpose than to show that the sale was not complete, within the terms of the common law, when *Johnson* ordered the goods and left *Pittsburgh*.

The goods were ordered to be shipped by the first boat, and the seller had no authority to ship by any other. *Ward's* testimony shows that *Johnson* was explicit in his direction that the glass should be shipped by the first boat leaving *Pittsburgh* for the *Wabash*. The appellees admit that they did not, and could not, comply with this direction, and here, we insist that whatever contract there was in this verbal order given by *Johnson*, was at an end; for the appellees had no authority to ship by any other boat. Importance seems, from the evidence, to have been attached to his requirement that the glass should be shipped by the first boat, and the sequel proves that it was a condition quite essential to the purchase, so far as the appellants were concerned; for, according to the evidence, the first boat that left *Pittsburgh* that spring, seems to have been the only one that ever arrived at *Lafayette*. When the appellees ascertained that they could not ship the glass to the appellants by the first boat, as directed, the parties stood, in relation to each other, as though no order had ever been made by *Johnson and Patton* for the shipment of goods to them by the appellees. Even had the order been in writing, in the most certain and solemn terms, filling every requirement of our statute of frauds, still, had it

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required the goods to be shipped by the first boat, it could not become binding upon the appellants, unless the goods had been thus shipped. From the time, then, that the *Latrobe* left the wharf at *Pittsburgh*, on her voyage, the appellants were entirely absolved from the order made the 12th of *March*, 1856. This is so plain a proposition that it is unnecessary to appeal to authority to demonstrate its correctness.

What act of *Johnson* and *Patton*, subsequent to the verbal order given by *Johnson*, at *Pittsburgh*, does the evidence in the case disclose, upon which they ever became chargeable for goods sold and delivered to them by the appellees? On the 2d of *April*, 1856, without request or authority from *Johnson* and *Patton*, the appellees shipped, on board the *Gov. Powell*, fifteen half-boxes of glass, and took a bill of lading, by which it was shown that the glass was consigned to *Johnson* and *Patton*, *Lafayette, Indiana*. A duplicate of this bill of lading, with an invoice of the goods, from the house of the appellees, was enclosed and sent by mail to the consignees. Now these acts, on the part of the appellees, were voluntary, and not in pursuance of any contract or request of the appellants. The goods thus shipped, never came to the hands of *Johnson* and *Patton*; and when, in *September*, nearly six months after they were shipped, the appellees presented a draft for the value of the goods, as invoiced, *Johnson* and *Patton*, because the goods had never been received, declined to accept the draft. This refusal to accept the draft, is the act upon which, by the instruction given to the jury, the appellants are to be held as having "waived their right of having the goods shipped by the first boat."

There being no contract arising upon the order of *Johnson*, while at *Pittsburgh*, and the goods having found their way into *Indiana*, by the voluntary shipment of them by the appellees, prior to which time there was no act of the appellants to charge them, if any contract of purchase was made by them at all, it was made in *Indiana* with reference to goods lying in a warehouse at *Terre Haute*. The proof shows that the first knowledge the appellants had, that the goods were at *Terre Haute*, was in *May* or *June*, 1856, two or three months after *Johnson* was at *Pittsburgh*. Up to the time that they were informed that the goods were at *Terre Haute*, *Johnson* and *Patton* had done nothing, according to the evidence, to make them liable for goods not shipped under their order. What act of theirs, after that time, is shown by the evidence, to make the letter refusing to pay for the goods, amount to a waiver of their order, or to an assent to a new contract? In the case of *Bushel v. Wheeler*, 15 Q. B. 442, n., cited by the counsel on the other side, the goods had been shipped by the very vessel indicated in the direction of the buyer. They had arrived at their destination, where the buyer was to have received them, and were placed in the warehouse of the owner of the vessel, where the buyer saw them. He told the warehouseman he would not take them, but did not so inform the seller, until after the lapse of five months. The language of *COLLIERIE, J.*, in that case, shows upon what grounds the Court held the contract binding. He says, "I agree that the acceptance must be, in the words of one of the cases, 'strong and unequivocal.' *Maberly v. Sheppard*, 10 Bing. 101. But that is quite consistent with its being constructive. Therefore, in almost all cases, it is a question for the jury, whether particular instances of acting or forbearing to act, amount to acceptance, or actual receipt. Here the goods are ordered by the vendee to be sent by a particular carrier, and, in effect, to a particular warehouse, and that is done in a reasonable time. That comes to



the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly." May Term,  
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In the case at bar, the goods were ordered to be sent by the first boat, and this was not done. In *Buskel v. Wheeler*, the goods were ordered to be sent by a particular carrier, and they were so sent. In the present case, they were ordered to be shipped to the buyers, and sent to them at *Lafayette*. They were shipped, contrary to order, on a boat that never reached *Lafayette*. In *Buskel v. Wheeler*, the goods were, in effect, ordered to the house of the buyer, and they were so shipped. The difference between the two cases is obvious. In *Richards v. Porter*, 6 Barn. and Cress. 437, the plaintiffs on the 25th of January, 1826, had sent to the defendant an invoice of five pockets of hops, and delivered the hops to a carrier to be conveyed to the defendant, and informed him that the hops were so forwarded. The invoice described the plaintiffs as the sellers, and the defendant as the purchaser of the hops. On the 27th of February, 1826, the defendant wrote to the plaintiffs as follows: "The hops (five pockets) which I bought of Mr. *Richards* on the 23d of last month, are not yet arrived, nor have I ever heard of them. I received the invoice; the last was much longer than they ought to have been on the road; however, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them." The Court, Lord TENTERDEN, C. J., held that there was not an acceptance of the goods. Now, in his letter, *Porter* refers to the invoice, acknowledges its receipt, and speaks of the hops, as the hops he had bought of the plaintiffs.

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Here we may notice the question arising upon our statute of frauds, discussed by the counsel for the appellees. As applicable to this question, the authority just cited is referred to. But before citing further authority upon the main question, it is proper to answer, briefly, the argument against the application of the law of *Indiana* to the contract sued on. It is urged, on the other side, that the goods in question were ordered in *Pennsylvania*, and that, in the absence of proof of the statute law of that state to the contrary, it will be presumed that the common law prevails there; and several authorities are cited in support of this proposition, which we admit, in some degree, seem to sustain it. But the recent decisions in *Indiana* and elsewhere overthrow the authorities thus cited. In *Blystone v. Burgett*, 10 Ind. R. 28, the Court say, that "the rule presuming the existence of the common law in a sister state, is very much shaken, if not entirely overthrown by the later authorities." In *Shaw v. Wood*, 8 Ind. R. 518, it is held that "where no law of a different state is proven, the Court would necessarily act upon the law of our own state." In *Monroe v. Douglass*, 1 Seld. 447, it is said to be "a well settled rule, founded on reason and authority, that the *lex fori*, or, in other words, the laws of the country to whose Courts a party appeals for redress, furnish, in all cases, *prima facie*, the rule of decision; and if either party wishes the benefit of a different rule, or law, he must aver and prove it." In *Farina v. Home*, 16 Mees. and Wels. 119, where the action was for goods sent from *Cologne* to *London*, on a verbal order of a person trading in *London*, the Court applied the *English* statute of frauds, and it does not seem, from the report of the case, that there was any doubt but that the contract, to be binding, should be so according to the laws of *England*. Upon these authorities, we submit, that if the facts bring the present case within the provisions of § 7 of our statute of frauds, the appellees had no right to recover. Our Courts have



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no laws upon which to construe a contract, other than those of this state, unless the law of some other state is a part of the contract, and brought to the notice of the Court upon the trial.

That the case is within the provision of the statute above cited, is manifest, and appears, from the character of the brief of the counsel for the appellees, to be yielded. The only authority to which reference is made in their argument upon this question, is that of *Bushel v. Wheeler*, 15 Q. B. 442. This authority we have already adverted to in another part of this brief, and shown, as we conceive, that it bears no resemblance to the present case, in point of fact, and that the decision was based upon circumstances peculiar to that case, and entirely wanting in this. The case of *Richards v. Porter*, 6 Barn. and Cress. 437, was a much stronger case, in its facts and circumstances, than the present one, and there the Court held that it was within the statute of frauds. The case of *Farina v. Home*, 16 Mees. and Wels. 119, was upon these facts: Goods were shipped by the plaintiff from *Cologne to London*, on the verbal order of the defendant; they were sent to a shipping agent of the plaintiff in *London*, who received them, and warehoused them with a wharfinger, informing the defendant of their arrival. The wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent and charges. The agent indorsed and delivered this warrant to the defendant, who kept it for several months; and, notwithstanding repeated applications, did not pay the price of, or charges on, the goods, nor return the delivery warrant, but said he had sent it to his solicitor. On these facts, the Court held that there was no such delivery to, or acceptance by, the defendant as to satisfy the statute of frauds. How much less do the facts in the present case show a contract of sale such as would satisfy the statute of frauds. By our statute (1 R. S. p. 301, § 7), "No contract for the sale of any goods, for the price of 50 dollars or more, shall be valid, unless the purchaser shall receive a part of such property, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed," &c. It is not pretended that any part of the goods, in this case, has ever been received by the appellants, nor that any earnest has been given to bind the bargain, or in part payment, or that any memorandum in writing has been signed, to charge them, unless the letter written September 16, 1856, refusing to pay for the goods because they had not been received, constitute such memorandum. The letter written by the defendant, in the case of *Richards v. Porter*, above cited, was held not to be such memorandum in writing. That letter was written, after the receipt of the invoice, and admitted that the defendant, in that case, had bought the goods, alleged to have been sold, and only complained that they had been delayed too long, stating that, unless they should arrive soon, the defendant would have to purchase others; and the only reason upon which it was held that the statute was not satisfied, was that there had been no delivery to, and acceptance of, the goods by the defendant, and no writing, or part payment, or earnest given, to charge him. In *Johnson and Patton's* letter, there is no recognition of any purchase, by them, of the goods, but only that the goods had been shipped to them by the house of the appellees, and had not been received, and, for this reason, they say, they decline to accept the draft drawn for them. The letter concludes with a casual civility, that seems to be seized upon by the counsel for the appellees, as a suffi-



cient memorandum in writing to take the case out of the statute of frauds. It is as follows: "If you can ascertain what disposition the boat has made of her cargo, we shall be pleased to hear from you." Now, it is said that this clause of the letter, in connection with the bill of lading and invoice, received from the appellees, form a "complete written contract," and 2 Pars. on Cont. 285, and note c, are referred to as authority. Upon examination of the text cited, it will be seen that the writer holds this language: "If the agreement be not itself signed, but a letter, alluding to, and acknowledging the agreement, is signed, this is sufficient." The note in support of this doctrine, which we do not dispute, contains a reference to a number of cases, all of which militate against the conclusion arrived at by the counsel for the appellees. The particular authority in this note, relied upon by the appellees, we presume, is *Jackson v. Lowe*, 1 Bing. 9. There, the purchaser of a hundred sacks of good *English* seconds flour, at 45 shillings a sack, wrote to the vendors as follows: "I hereby give you notice, that the flour you delivered to me, in part performance of my contract with you for one hundred sacks of good *English* seconds flour, at 45 shillings per sack, is of so bad a quality that I cannot sell it, or make it into saleable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To this the vendors, by their attorneys, answered: "Messrs. L. and L. consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and, unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount." It was held that the jury were warranted in concluding that the contract mentioned in the vendor's answer, was the same as that particularized in the letter of the vendee. In the same note (c), we find the case of *Richards v. Porter*, 6 Barn. and Cress. 437, the correspondence in which, we have already quoted in this brief; and it is, according to our view, a very apt authority, and a complete answer to the entire argument of the counsel for the appellees on this question. The case of *Jackson v. Lowe* bears no resemblance, in its facts, to the case at bar. We refer the Court, on this question, to Brown on the Statute of Frauds, §§ 328 to 333, inclusive, and the authorities there cited and commented on.

In view of the facts in this case, the first instruction given by the Court, at the instance of the appellees, is wrong. A delivery of goods by the seller to a common carrier, is not a sufficient delivery to the vendee, to charge him for goods sold and delivered, in the absence of a contract such as would satisfy the statute of frauds. This is now admitted by the counsel for the appellees; and we insist that this admission is equivalent to a confession of error in this particular.

The third and fourth instructions given, at the instance of the appellees, are also erroneous, as being irrelevant, and not warranted by any facts disclosed in the evidence. They are liable to the further objection, of taking from the jury the decision of a question which should have been left to them to decide.

(2) Counsel for the appellees argued as follows:

The appellants contended in the Court below, and will, we presume, insist here, as it seems to be the only point in the case, that the contract, being for the sale of goods of over 50 dollars in value, is void by the statute of frauds. 1 R. S. p. 301, § 7.

This objection to the validity of the contract is susceptible of two answers:

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1. At common law, the contract would have been binding, and the question of its invalidity must depend upon the law of *Pennsylvania*, as it was made and to be performed there, so far as any act of the appellees was concerned. There was no proof as to whether the statute of 29 Car. II. is in force in *Pennsylvania* or not; and the question is, what will the Courts of *Indiana* presume on the subject? We insist that it must be presumed, the contrary not appearing, that the common law is in force in that state upon this subject. There is an apparent conflict in the decisions upon the question as to how far the Courts will indulge the presumption of the common law being in force in other states; but without endeavoring to reconcile them, or yet to argue which class is the better authority, we remark that within the spirit of them all our position is correct.

It has been frequently decided that the question of the statute of frauds is one of evidence, not of pleading. *Miller v. Upton*, 6 Ind. R. 53. When the evidence was introduced, it appeared that the contract was made, and, so far as any act of the appellees was concerned, was to be performed in *Pennsylvania*. At this point, the appellants object that the contract, good at common law, is void by the statute of frauds. What statute? No statute of *Pennsylvania* is proved, and none of *Indiana* can operate there, because beyond the jurisdiction of the state.

It then devolves upon the party setting up the defense of invalidity, to make it good. *Stout v. Wood*, 1 Blackf. 71, illustrates our position. That was an action of slander, for words spoken in *Ohio*, which would have been actionable in *Indiana* by virtue of our statute, but which were not actionable at common law, or shown to be actionable under any statute of *Ohio*. A judgment for the plaintiff was reversed on the sole ground that the Courts could not presume a statute to be in force in another state which would confer a right of action for what was not actionable at common law, although such statute would be identical with our own. Now, can the Courts presume that a statute exists in *Pennsylvania*, which gives a party a defense which he would not have at common law, although he has it by the statute of this state? The doctrine of this case was affirmed in *Titus v. Scanling*, 4 Blackf. 89, and *Offutt v. Earlywine*, *id.* 460. The case of *Trimble v. Trimble*, 2 Ind. R. 76, is directly in point. That was a bill for divorce and alimony; and an answer was put in denying the marriage, which was alleged to have taken place in *Virginia*. The Court say: "As no statute of *Virginia* upon the subject was in evidence on the trial of this cause, the common law would be presumed to be in force there relative to marriage contracts; and hence, the marriage in this case, which may be inferred from the evidence, might have been valid." No distinction can possibly exist between *Trimble v. Trimble*, and the case at bar, so far as the question under discussion is concerned. To paraphrase the above language, it would read thus: "As no statute of *Pennsylvania* upon the subject was in evidence on the trial of this cause, the common law would be presumed to be in force there relative to contracts of sale; and hence, the sale in this case, which may be inferred from the evidence, is valid."

It is true, that the cases in 8 and 9 Ind. R., collected in § 2, p. 477, Perk. Dig., tit. Foreign Law, following the remarks of Foot, J., in *Monroe v. Douglass*, 1 Seld. 452, hold that the *lex fori* furnishes, in all cases, *prima facie*, the rule of decision; and if a party wishes the benefit of the *lex loci contractus*, he must aver and prove it; still, we do not believe it to have been the intention



of the Court to overrule the earlier cases which establish the doctrine in *Trimble v. Trimble*.

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There was some apparent conflict in the authorities, but the better and more modern opinion seems to be that the *lex loci contractus* governs in the case of goods ordered in one state to be sent to, and paid for, in another. Story's Conf. of Laws, § 285.—16 U. S. Dig. 428, § 19, citing *Houghtaling v. Ball*, 19 Mo. R. (4 Benn.) 84. Such being the case, it seems to follow, as a necessary consequence, that the party claiming a defense under the law of the contract, should aver and prove it.

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2. But, admitting that the contract was at first void by the statute of frauds, still we insist that there has been such a delivery of the goods as to take the case out of the statute, and make the contract valid.

After a careful examination of the authorities, we are led to the belief that the doctrine of *Hart v. Sattley*, 3 Camp. 528, and *Dawes v. Peck*, 8 T. R. 330, where it is held that the delivery of goods to a common carrier, without any further act of the vendee, is a delivery to the vendee, has been overruled in the cases cited in Browne on the Statute of Frauds, §§ 328, 329, and 330, and in 2 Pars. on Cont. 327, 330. The current of authority now seems to be that the contract is not completed by the delivery of the goods to a common carrier, unless they have been received, or the act of the vendor in shipping has been recognized and ratified by the vendee.

We insist, however, that in this case, the conduct of the appellants has ratified the contract, and taken the case out of the statute.

A fair construction of the appellant's orders as to shipping is, that the appellees should ship by steamboat at the first opportunity. It is true, the witness, *Ward*, states that the appellees were told to ship by the first boat; but these were mere general instructions, and ought not to be so construed as to lead to unreasonable and absurd results. Suppose the first steamboat for the *Wabash* river had been notoriously unseaworthy, whereby the safety of the goods would have been greatly jeopardized; or, suppose the captain had demanded ten times the customary rates of freight for the transportation of the glass, would it be insisted that the appellees could have justified the shipment of the glass under such circumstances, when, perhaps, their waiting a single hour would have afforded an opportunity to ship on a standard boat at ordinary prices? The evidence shows due diligence on the part of the vendors to ship the goods, and a reasonable compliance with the vendee's orders. The bill of lading was sent to, and received by, the defendants, and for several months they failed to notify the plaintiffs of their dissent to the shipment on board the *Powell*, although they saw the *Latrobe* at the wharf in *Lafayette*, early in *April*. They were apprised of the fact of the glass being at *Terre Haute*, where it was discharged by the *Powell*, as early as *May* or *June*, and still they do not dissent. Finally, on the 16th of *September*, they make inquiries, and express a desire to find the property; and although they refuse to accept the draft because the glass has not arrived, still they do not intimate that they are not liable for the debt. It was urged that these acts amounted to nothing, but the question was one of fact properly left to the jury, and they have found by their verdict that the appellants have ratified the act of shipment. It seems that this should settle the case. *Bushel v. Wheeler*, 15 Q. B. 443, n, cited in note u, 2 Pars. on Cont. 329, is directly in point.



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v.  
THE MARTINSVILLE,  
&c.,  
RAILROAD Co.

BREEDLOVE v. THE MARTINSVILLE AND FRANKLIN RAILROAD COMPANY.

Assumpsit by a railroad company on a subscription of stock. Trial upon the general issue. The plaintiffs proved by their secretary that certain books had come into his possession from his predecessor, as books of the company, one of which purported to contain subscriptions to their capital stock, and another, to contain their proceedings. Certain entries in these books were admitted in evidence. The subscription-book contained resolutions of the directors, fixing the amount of a share, the terms, &c. To these, the declaration averred that the defendant placed his signature, with the number of shares he desired. The resolutions were specially set forth in the declaration.

*Held*, 1. That the proof of the identity of the instrument offered in evidence, with that declared on, was sufficient, if, indeed, such proof was at all necessary.

2. That under the issue, proof of the execution of the instrument was not necessary.

3. That under the decision in *Judah v. The American Live Stock Ins. Co.*, 4 Ind. R. 333, the admission of the extracts from the books of the company was not error.

The terms of payment contained in the resolutions subscribed were, that one dollar be paid in hand on each share, at the time of subscribing, and that 10 per cent. on each share be paid every sixty days after the work shall be put under contract. The work was put under contract in 1850; but there was no evidence that the defendant had notice of that fact, nor that any call had been made for the payment of installments, or payment demanded, though the declaration alleged such demand. *Held*, that such notice was not necessary.

Thursday,  
May 26.

APPEAL from the *Morgan* Circuit Court.

HANNA, J.—This was a suit by the appellees against the appellant, on a subscription of stock. It was an action of assumpsit, and tried upon the general issue, under the old form of pleading and practice. Judgment for the plaintiffs.

Upon the trial, the plaintiffs proved by their then secretary, that certain books had come into his possession from his predecessor, as books of the company, to-wit, one purporting to contain subscriptions to the capital stock of said company, and one containing the proceedings thereof. Certain entries in said books, offered in evidence, were admitted over the objection of the defendant.

This ruling raises the first question.

The subscription-book, as it is called in the record, con-



tained resolutions of the acting board of directors, fixing the amount of a share, terms, &c. To this, it is averred, the appellant, among others, placed his signature, with the number of shares he desired opposite. These resolutions, &c., are specially set forth in the declaration. The plea is not verified by oath.

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If any proof was necessary of the identity of the instrument offered in evidence with that declared on, we think that made was sufficient. Proof of the execution of the instrument was not necessary, under the issue. R. S. 1843, p. 711, § 216.

As to the admission of the extracts from the record of the proceedings of the board of directors, in reference to the organization of the corporation, no objection thereto has been pointed out, and, even if such evidence was necessary to the issue, still, under the decision in the case of *Judah v. The American Live Stock Ins. Co.*, 4 Ind. R. 333, we do not perceive any error in the rulings of the Court upon that point. *Wright v. Selby*, 16 B. Mon. 5.—Redf. on Railw. 85.—Ang. and Ames on Corp. §§ 633, 635.

*Secondly.* It is alleged that the Court erred in finding for the plaintiffs upon the evidence given.

The evidence is in the record, and this general assignment was sufficient, at the time it was made, to require us to look into that evidence.

The terms of payment, as contained in the resolutions subscribed, were, among other things, that "the sum of one dollar be paid in hand on each share, at the time of subscribing, and that ten per cent. on each share be paid every sixty days after the work shall be put under contract by the proper board."

There was evidence that said work was put under contract "as early as *July*, 1850;" but there was no evidence of notice having been given to the appellant of that fact, nor that any call had been made for the payment of installments, or demand of payment from defendant, although such a demand is specially averred in the declaration.

The suit was commenced in *February*, 1852.



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Was the evidence upon the part of the plaintiffs sufficient?

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It is said by this Court, in the case of *Ross v. The Lafayette, &c., Railroad Co.*, 6 Ind. R. 298, that the question of notice was to be determined upon the contract of subscription sued on; and in that case, the undertaking was to pay "at such times and places as shall hereafter be directed by the directors of said company." The Court finally concluded that where the agreement by the subscribers was "to pay their subscription at such times as the directors shall fix, without stipulating for notice, we think that suit may be maintained without it." That decision appears to be cited with approbation in *Redfield on Railways*, p. 81, and followed in *Johnson v. The Crawfordsville, &c., Railroad Co.*, 11 Ind. R. 284.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*G. G. Dunn*, for the appellant.

*W. R. Harrison, L. Barbour, and A. G. Porter*, for the appellees.

#### GATLING v. NEWELL and Another.

Thursday,  
May 26.

APPEAL from the *Montgomery* Circuit Court.

HANNA, J.—Petition for a Rehearing.

An opinion was pronounced in this case at the *November* term, 1857, in which several of the rulings of the Circuit Court, to which objections were urged, were affirmed, and as to other rulings they were reversed. 9 Ind. R. 572.

As to those rulings in which, by that opinion, it was decided that the Circuit Court had erred, the appellees filed a petition for a rehearing. A rehearing was granted; and now, upon the calling of the cause at this term, the appellees made a motion to submit the case upon the points



mentioned in the petition for a rehearing—being the same ruled against them in the above cited opinion.

Pending this motion, the appellant suggested a diminution of the record, in this, that the demurrer to the amended complaint does not appear in the record, and, therefore, moved the Court to order a *certiorari* to complete the record; and, also, that he have leave to amend his assignment of errors, based upon the decision of the Court below upon that demurrer.

Questions of practice, under the statutes and rules of the Court, arose upon these motions, which were argued orally.

*Held*, that the motion for a *certiorari*, under the circumstances, is not within a reasonable time, especially as no excuse is offered for a failure to make the application before the former submission. 2 R. S. p. 164, § 581.

*Held*, also, that the question on the demurrer had already been decided, in this case, at a former term, when it was in this Court (7 Ind. R. 147); and that the demurrer was not, therefore, a necessary part of the present record, nor the ruling of the Circuit Court thereon a proper cause for the assignment of error.

*Held*, further, that, under the fourth rule of this Court (4 Ind. R. vii.), a rehearing granted upon a petition, asking for such rehearing as to certain points, or a portion, only, of those decided in a cause, limits a reëxamination to the points decided and included in such petition.

*W. Z. Stuart* and *J. A. Liston*, for the appellant.

*S. C. Willson*, *J. E. McDonald*, *S. Judah*, and *H. O'Neal*, for the appellees.

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Where representations, as to the superiority of a patented machine, and the demand for it, are confined to general statements, or expressions of opinion, upon facts equally within the knowledge, or open to the reasonable inquiry of either party, a right to rescind a contract of purchase of the patent could not arise, as a matter of course, because of the falsity of such representations.

Representations touching the existence of circumstances connected with, and the terms of, contracts at various places for the manufacture and sale of a patented machine, are such, that the law presumes the party making them (in this case the vendor of the patent) to be fully cognizant of their truth or falsity; and such representations having relation, in this case, to the income derived from the machine, and to private contracts to which the other contracting parties (the vendees of the patent) were strangers, they were not open, as a matter of right, to their inquiry pending negotiations for the purchase; but they were, nevertheless, such representations as they had a right to rely upon.

*Semble*, that a complaint may ask the rescission of a contract, or, if that cannot be had, damages for its violation.

The case between these parties, reported in 9 Ind. R. 572, modified in this: that it gives too great weight to the intrinsic value of the patent, in determining the validity of certain contracts for its manufacture and sale.

Where the vendor of territorial rights in a patented machine, made certain representations touching the present value of such rights and the present availability and utility of the machine; and in a complaint for rescission of the contract the vendees allege that the representations were false—it was *held* no defense to say that now—five years having elapsed—the rights and the machine are of the full value and utility then represented; and that, of course, evidence to sustain such a defense would be inadmissible.

The contracts sought to be rescinded, in this case, were made in 1850 and 1851, and had reference to territorial rights in *Ohio*, *Michigan*, and *Minnesota*. Evidence of the amount for which territorial rights had been sold in certain counties of *Illinois*, in 1856, and of the value of such rights in *Illinois* at that date, was rejected. *Held*, that there was no error; that the evidence should have been confined to a period of time nearer the execution of the contracts; that evidence upon these points could not properly embrace a period later than one year after the contracts were made.

The case between the same parties, reported in 7 Ind. R. 147, affirmed.

If a rehearing be prayed as to particular points, and granted as asked, it will be confined to those points.

And if the opposite party should desire a rehearing of any other points, he should petition for it.

Thursday,  
May 26.

APPEAL from the *Montgomery* Circuit Court.

HANNA, J.—This case was heretofore before this Court upon the pleadings (7 Ind. R. 147), and again after trial



(9 Ind. R. 572); and a rehearing having been petitioned for, by the appellees, and granted, as to certain points, we have again considered the case as to those points.

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In regard to the points decided by the opinion in 9 Ind. R., against the rulings of the Circuit Court, and upon which a rehearing was granted, we have experienced much difficulty in coming to a conclusion.

It will be remembered that it was alleged that certain false representations were made, as to the superiority of the patent and drill, and the great demand for the same. Whilst such representations were confined to general statements, or expressions of opinion upon facts equally within the knowledge, or open to the reasonable inquiry of either party, we cannot see that a right of rescission could, as a matter of course, arise, because of the falsity of such statements.—*Cronk v. Cole*, 10 Ind. R. 485.

It is averred in the complaint, but denied in the answer, that certain false and fraudulent representations were made in regard to the existing circumstances connected with, and the terms of, contracts at *Chicago* and *Urbana*, for the manufacture and sale of the drill.

These facts were such as the law would presume the appellant to be fully cognizant of; and having relation to the income derived from that source, and to private contracts, in which the appellees were not parties, were not, in our opinion, open, as a matter of right, to their inquiry, pending the negotiation for a purchase, but were, nevertheless, such representations as they might rely upon.

It has been decided that a representation relating to the income or rent of an estate, does not fall within the rule, that the seller is not bound by representations respecting the value of property sold, because it is a matter that may be equally known to both parties, for the reason that the knowledge of it may be, and usually is, confined to one party, and the other can be presumed to ascertain it accurately only from him, or from those standing in a confidential relation to him. *Irving v. Thomas*, 18 Maine R. 424.

In *Dobel v. Stevens*, the defendant was in possession of a public house, under a lease, and represented to the plain-



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tiff, who was negotiating to purchase the lease, that the receipts per month amounted to a certain sum, from various designated sources. Averment of the falsity of the representations, &c. The plaintiff proved that the representations were made as averred, and that they were false. The witness stated, on the cross-examination, that the books of the defendant were in the house, and might have been inspected by the plaintiff, and would have shown the truth as to certain of the representations, &c. It was held that if the vendor gave in a particular of his rents, and the vendee says he will trust him and inquire no further, then, if the particular be false, an action will lie. 2 Barn. and Cress. 623.

In the case at bar, there was evidence tending to sustain the averments of the falsity of the representations concerning the *Chicago* and *Urbana* contracts. The judge, sitting as a jury, must have found, before a decree could be entered in the form it was, annulling contracts following such representations, not only that they were false and fraudulent, but that they were, by the appellees, relied upon as true, and had induced them to make the contracts. If these were the only questions that properly arose in the case, we could not, under repeated decisions of this Court, disturb the finding. *Bronson v. Hickman*, 10 Ind. R. 3.—2 Pars. on Cont. 268. Whether these were the only questions (other than those already passed upon by this Court) involved in the trial, depends upon whether the question of the value and utility of the patent right and drill, and representations in relation thereto, were necessary to be considered in arriving at a conclusion as to the validity of the contracts.

Much of the confusion in which the case appears to have been involved, and the conflict of opinions and arguments of counsel, so fervently advanced and zealously urged, were, doubtless, superinduced by the form of pleading adopted, looking first to a rescission of the contracts, or, if that could not be obtained, then asking damages. But this form of pleading has been, in effect, approved by this



Court, in an opinion by Judge STUART, in *Colson v. Smith*, May Term, 9 Ind. R. 8. 1859.

Under the issues formed upon this complaint, we are still of the opinion that evidence of the value of the right and drill was important and relevant, if the question of damages was to be determined, and perhaps, also, upon the question of rescission, though possibly not to the extent indicated in 9 Ind. R. upon the latter point.

It appears to us that the gravamen of the charge of fraud arises out of the alleged false representations concerning the *Urbana* and *Chicago* contracts. It is alleged that the appellant represented that contracts had been entered into at those places for the manufacture and sale of a great number of the drills—the manufacturers agreeing to pay the appellant a fixed sum as premium for each one so sold; that considerable numbers had been sold under these contracts, and the demand was becoming so great that at least one manufacturer at *Urbana*, intended abandoning all other business, and enlarging his facilities for the construction of the drill. These representations presented to the mind a present and increasing income, arising from the patent, without finally disposing of the territorial rights therein, or incurring other expenses. We can very well perceive that instances might arise in which aged or infirm persons, or others about to leave the country for a time, or engage in some pursuit in life in which it was not desirable to be distracted by pecuniary cares, might be induced to invest money upon such representations relative to the income arising, and likely to arise, therefrom, without reference to the intrinsic value of the patent, or of the territorial rights conveyed. In such instances, we can scarcely believe that the intrinsic value should, in determining the validity of the contracts, have so great weight as the opinion in 9 Ind. R. appears to indicate.

If we are correct in this, that each case must, to a great extent, be determined by its own circumstances (Chit. on Cont. 681.—2 Pars. 267), then another question becomes more important than it might otherwise be considered, and that is, as to the period of time to which inquiry should

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be directed to ascertain not only the value of the territorial right involved, but also the value of the patent itself. The invention might be useful and valuable, and at one period of time might not, for want of public appreciation, have any marketable or available price, and yet five years later, it might be estimated at a high rate by the public, because, in the meantime, information had been conveyed of such utility. If no information had been given, its estimated value might remain stationary. It will at once occur to the mind, that a man who should purchase a territorial right, when it was thus, in fact, of no available value in public estimation within that territory, without any expectation or intention of making expenditures of time or money, or otherwise using means to change that estimation, would have more cause of complaint if false representations should be made, of the character charged, than he who should purchase with the expectation, by great outlays and exertions, to fully develop its usefulness. If such a purchaser should be driven, by the circumstances of the case, from his original purpose, and compelled, to save his investment, to spend other larger sums of money, much time and attention, we do not think it would be a sufficient answer to a charge that representations, at the time of the contract, as to value and present available profits, were false—to say, “that may be so as to the profits of contracts, and may have been so, but as to value, it is now—five years having elapsed—of the full value then represented.” If such an answer should be held good, and evidence of that character suffered to go to the jury, it would be permitting inventors to avail themselves of the capital, time, and energies of others, to an extent which we think is at war with the principles of law governing somewhat analogous cases, to which reference will hereinafter be made.

As to a territorial right in a particular invention, the value of that right—the general utility of the invention being conceded—would depend much upon the condition of the territory. A shingle machine, or an improvement in a saw-mill, might have much value in a timbered coun-



try, and none in a prairie. Consequently, such inventions would depreciate in value in the first-named territory when the timber was exhausted. Upon the location of a railroad through a timbered territory, an inventor of such improvements might well say, the right to that territory is of the value of 1,000 dollars, and will, perhaps, sell for that price. At the end of five years, after the timber in the given territory had been exhausted, through the use of the improved machinery, ought the purchaser of the right to be permitted to make proof that it was then of no value in that territory, as an answer to a demand for the purchase-money for such right?

We are not now combating the general propositions advanced in 9 Ind. R., but desire to carefully inquire into the correctness of the application of the principles advanced, to the case at bar.

A patent for a limited time, say seven years, for an improved mode of manufacturing wine from grapes, might be of much value in a grape-growing country; and yet, within that time, it might not be of any great value in another region of country equally well adapted to the cultivation of the grape, for the reason that, in the last-named place, attention might not have been turned to such pursuits. Nevertheless, ultimately it would, upon the development of that branch of industry, become equally valuable there. But that might be after the expiration of the patent right.

It is difficult to distinguish the difference, in some respects, between the rights, and the rules of law applicable thereto, of a lessee of real estate for a given period of time; and the rights, &c., of the assignee of a patentee in designated territory, for the same time. In the one case, the landlord assumes to grant certain exclusive rights for the time agreed upon. So, in the other instance, the patentee assumes to grant certain exclusive rights, for, say the same length of time. If the landlord fails to comply with his contract, adjudicated cases have fixed the point of time to which attention should be called, and evidence directed,

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In *Trull v. Granger*, 4 Seld. 115, a contract was made in *September*, 1849, by which certain premises were leased for a term of five years, commencing the next *May*, at which time possession was to be delivered, at an annual rent of 500 dollars. In *May*, when the agreement was to have been performed, the value of the premises had risen to the sum of 600 dollars per annum. The landlord failed to deliver possession. In a suit by the lessee against the lessor for such breach, the plaintiff had a verdict for 415 dollars, 99 cents. The Court of Appeals say: "The rule of damages adopted in this case was correct. \* \* The difference between the yearly value of the premises and the rent, was the true measure of damages." In that case, it will be noticed that the yearly value of the premises had advanced 100 dollars, from *September* until *May* following, assuming the price agreed upon to have been the reasonable value at the time of the contract. At the same rate of increase for every eight months, until the expiration of the five years, the sum would be much more than the amount of the verdict. There is no indication that any attempt was made to claim the increase, if there was any, of the annual value of the premises after the breach of the contract, although some time had elapsed before trial. The language of the Court would preclude the idea that such a proposition, if made, could have been entertained. The judgment was for the difference between the price agreed upon and the yearly value at the time of the breach of the contract, deducting interest.

Under the acts of congress of 1830 and 1834, preëmp-tion rights were granted to certain settlers, to be located any place in the land district, &c., and were called *floats*. In an action on an agreement by which two eighty-acre *floats* were to be transferred at a fixed price; this Court held that the measure of damages was the value of the article at the time of the breach, and not "the advance or advantage to be derived from land reasonably well located



as a *float* of preëmption in the land district," or damages for the fancied goodness of the bargain which was lost. *Ward v. Burr*, 5 Blackf. 116.

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It is also a well known principle of law, that the measure of damages for the breach of an executory contract for the delivery of a specific article of personal property, at a fixed time and place, is regulated by the difference between the contract price and the market value of such articles, at such time and place. *Hopkins v. Lee*, 6 Wheat. 109, 118.—*Dana v. Fiedler*, 2 Kern. 41.—*McKnight v. Dunlop*, 1 Seld. 537.—*Clark v. Moore*, 3 Mich. R. 55.—*Barnard v. Conger*, 6 McLean, 497.—*Rawdon v. Barton*, 4 Texas R. 289.—*Smith v. Dunlop*, 12 Ill. R. 184.—*Cannon v. Holson*, 2 Iowa R. 101.—*Van Fleet v. Adair*, 1 Blackf. 346.—*Id.* 296.—4 *id.* 260.—*Lucas v. Heaton*, 1 Ind. R. 264.—10 *id.* 20.—2 Greenl. Ev. 272.

So in actions for the breach of special agreements or contracts, for the construction of public works, it has been held that, although profits upon such contracts may be recovered to a certain limit, yet such profits must be calculated and based upon the difference between the contract price, and the price at which the performance of the work could be procured, at the time of the breach. *The Philadelphia, &c., v. Howard*, 13 How. 397.—*Story v. The New York, &c.*, 2 Seld. 85.—*Seaton v. The Second, &c.*, 3 La. R. 45.—*Cunningham v. Dorsey*, 6 Cal. R. 19.—*Masterton v. The Mayor, &c.*, 7 Hill. 62. In the latter case, the plaintiffs, at the time of the breach of the contract, had near five years to complete it; and yet the Court instructed the jury that, "In fixing the damages to be allowed the plaintiffs, the jury are to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of wages, or subsequent circumstances." But even to that extent, the correctness of the measure of damages adopted, in this class of cases, appears to be incidentally doubted by our own Court. *Jones v. VanPatten*, 3 Ind. R. 107. In that case it is also decided, in effect, that in actions for breach of ordinary contracts between individuals, the mea-



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sure of damages is not the price stipulated to be paid on full performance, but the actual injury sustained in consequence of the defendant's default; and that the sum which ought to be recovered is what would make the plaintiff reasonably whole at the time of the breach, all the circumstances of the case being considered.

These cases are cited as being, in our opinion, based upon principles somewhat analogous to those that should govern in arriving at a conclusion as to the correctness of the rulings now under consideration in the case at bar.

Without stopping to critically examine and nicely weigh the facts and circumstances of this case, to ascertain whether the question of the value of the patent and of the territorial rights, was one necessarily to be considered by the Court, to the extent indicated in 9 Ind. R., in determining upon the prayer for a rescission of the contracts, we are of opinion that, even if evidence should have been heard upon that question, that offered and rejected was not admissible. The contracts sought to be rescinded were entered into in *November, 1850*, and *February, 1851*, and had reference to territorial rights in *Ohio, Michigan, and Minnesota*. The evidence offered and rejected, was as to the amount for which territorial rights had been sold in certain counties in *Illinois* in 1856, and also as to the value of the right in *Illinois* at the latter date. Such evidence should have been confined to a period of time nearer the execution of the contracts. The Circuit Court permitted proof upon those points, up to, and for a year after the time the contracts were made. We think this was as much as the appellant could ask—as extended a margin as he could rightfully claim to make proof in; and much more so than has been, by other Courts, permitted in the several classes of cases above cited.

PERKINS, J.—I take no part in the decision of this cause upon the present (its third) examination here; and I should not have said a word at this time in reference to it, did not some remarks of counsel, in their argument upon its present submission, render it imperative, considering the part



heretofore taken by me in the case, and the subsequent change in the bench, that I should briefly review its past history.

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The remarks of counsel spoken of relate to—

1. The decision reported in 7 Ind. R. 147.
2. The construction of the 4th rule of this Court.

It is said the decision in 7 Ind. R. was out of time and wrong in law.

The case was in chancery, instituted to obtain the rescission of a contract and damages. The bill was demurred to, and the demurrer sustained so far as the application for rescission was concerned. Other rulings, also, were made. An appeal was taken from those rulings to this Court. Both parties assigned errors, filed briefs, and asked a decision of this Court upon those rulings. They did not object to the jurisdiction. The Court considered the case, and decided, besides other questions of practice, these two material points:

1. That the appeal was prematurely brought, as the final judgment in the cause had not been rendered.
2. That the bill, upon its face, made a case for rescission.

The Court had jurisdiction of the cause. The appeal came to it in the usual form from the Court below; and no motion was made to dismiss it. It was submitted by both parties. The Court had jurisdiction, necessarily, to entertain it so far as to determine the question whether the judgment below, appealed from, was such a judgment, as could, at the then stage of the case, be reviewed on appeal; and, being legally in possession of the case for that purpose, it was, it strikes me, a less departure from propriety in the Court, to express, at the solicitation of both parties, an opinion upon a further point argued, than it is in one of those parties now to assail the Court for having complied with the request.

And was that decision wrong in law?

The bill charged that the contract sought to be rescinded was obtained by fraudulent representations which the plaintiffs believed to be true, relied upon as so, and that



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they were induced to enter into the contract by them. They were representations upon which the purchasers had a right to rely. Were any of those representations of such a character as, being fraudulent, vitiated the contract? Was any one of them such? Did any one of them go to a fact constituting a material part of the consideration of the contract? One of the representations charged in the bill was that he, *Gatling*, had a contract with *Minturn, Allen & Co.*, in *Champaign* county, *Ohio*, a county included in the sale of the patent right in question to *Newell* and *Beach*, together with the benefit of said contract, by which contract said *Minturn, Allen & Co.* were to manufacture drills for the supply of that section of country, and were to pay to *Gatling*, and thenceforth to his assignees, *Newell* and *Beach*, 10 dollars for each drill sold; that they had already paid 300 dollars, pursuant to the contract, for drills sold; that they were unable to supply the demand, so great was it, for the drill, and were about to enlarge their establishment, &c., to enable them to do it. Now, were not these facts going to a material part of the consideration? Here was the sale, by representation, to the purchasers of the patent, of a valuable income from the very day of purchase. Yet, the bill averred that the representation was utterly false. I have no hesitation in now saying that the decision of this Court upon that bill was right. Whether such representations were made, whether they were relied on, or had been waived, &c., were questions to come up afterwards upon a trial.

Next as to the construction of the 4th rule of the Supreme Court. That rule reads:

"Rehearings must be applied for during the term in which the decision is made, and by petition in writing, setting forth the causes for which the judgment or decree is supposed to be erroneous. The Court will consider the petition without argument, and direct the rehearing, if granted, to one or more points, as the case may require."

In this case, the petition asked for a rehearing upon two points, setting forth causes as to those points, and no more. The Court granted the rehearing as to those points, and



what more could it, consistently with the rule, upon such a petition, have done? Yet, in thus acting, the Court is charged with adopting a "new reading" of this rule. But the Court might ask the counsel to cite a case where, upon a petition for a rehearing upon given points, any other reading was adopted. No such citation has been furnished.

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The Court decided to grant the rehearing in accordance with the prayer of the petition. This was proper; but that act did not determine the question as to the legal effect of the grant. And it seems to be the rule in chancery practice, in which alone rehearings are granted in *England*, that a rehearing as to particular points, granted upon the application of one party, opens up the whole case for argument to the opposite party, so far as anything in it might influence action upon the points on which a rehearing is asked. *Consequa v. Fanning*, 3 Johns. Ch. 394.—*Dale v. Roosevelt*, 6 *id.* 255.—3 Dan. Ch. Pr. (Perk. ed.) 1632. To this rule, counsel have conformed in their argument of this cause. By the *English* practice, new trials are granted at law, and rearguments in Courts of error; but we have met with no case where a rehearing was granted after final decision in a Court of error and appeals at law. They are common in chancery, and are analogous to new trials at law. For good reasons, without doubt, they have been incorporated into the practice of the Supreme Court in this state, as applicable to cases both at law and in chancery. But the practice in granting them, in this Court, is governed by our statute, and the rule of the Court. By them, either party may petition for such rehearing at any time within sixty days from the first decision. The rehearing may be applied for as to the whole case, or particular points. The cause remains uncertified for the period named. Hence, both parties must take notice of petitions; and if the filing of a petition by one should render it expedient for a petition, also, by the other, he must file it, if he wishes alleged errors as against himself considered. Such we consider the better practice in the Supreme Court under the rule.



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*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*W. Z. Stuart and J. A. Liston*, for the appellant (1).  
*S. C. Willson, J. E. McDonald, S. Judah, and H. O'Neal*,  
for the appellees (2).

(1) Mr. *Stuart* made the following argument:

The points to which the present submission is confined are those arising on the fourth and fifth bills of exceptions taken during the progress of the trial below.

The other points raised in the cause, and determined when heretofore submitted, the Court has decided to be closed. That decision, if it was rightly apprehended, is, that a rehearing is granted only to the party petitioning for it, and then only as to the points specifically made in the petition, or as to some one or more of them; and that the word "case," as used in the fourth rule, means the case made in the petition for a rehearing, not the "case" as originally presented on the first submission. All other points made and determined on the original submission, to which no petition for a rehearing was addressed in proper time by either party, the Court regard as definitely settled.

The application of this novel construction of the rule has operated with extreme hardship upon the appellant. It is believed that this has not hitherto been the practice of the Court. It is believed that in the few instances in which a rehearing has been granted, it operated like a new trial to open the whole case.

Still we are not understood as complaining of the rule. As to all such rules of practice it is not very material what they are, so that their application be uniform. All that the profession can ask is, that the practice which has grown up for forty years under the rules shall be adhered to as a proper exposition; and that all new readings of old rules, or any modifications of them, should be promulgated before they are applied.

The effect of the decision alluded to on *Gatling's* case is, that because he did not petition for a rehearing on the points decided against him within sixty days, he is therefore concluded as to those points, though a rehearing was granted to the opposite party.

We may be permitted respectfully to suggest, that for a party in whose favor a case had been reversed to petition for a rehearing, would look a little awkward. Would not such a petition seem like an attempt to trifle with the time and patience of the Court? This Court has never listened with much indulgence to a petition for a rehearing in any case—not even when preferred by the party against whom the case was decided. There must be a remarkable change in the judicial mind, if this Court would look complacently on a petition for a rehearing from the party in whose favor the case had been reversed. Such petitions are always felt to be an imputation on the care, diligence, and learning of the Court. As such they were regarded in *The State v. The Vincennes University*, 5 Ind. R. 77; *Greencastle Township v. Black*, *id.* 557, and many others which might be cited. In many of these cases, accordingly, the petitioner, though he was the party against whom the decision was made, was yet handled without gloves for his presumption.



But if such is the rule, so be it. The construction given to-day against us, may serve our turn to-morrow.

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It is presumed that if there were other points made on the former submissions, but not passed upon by the Court in either of the decisions reported in 7 Ind. R. 147, or 9 Ind. R. 572, these points thus undetermined must also remain open questions under this submission.

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The burden of the fourth and fifth bills of exceptions is, the error of the Court below in excluding certain evidence. To understand the application and force of the excluded evidence, it will be necessary to keep in mind what was to be tried. To this end let us inquire briefly:

1. What were the issues joined between the parties?
2. What did the trial by the Court embrace? Was it one or all these issues?
3. Was the rejected evidence pertinent and relevant to any one or more of these issues?

If the evidence rejected was pertinent and relevant to any one of these issues, then we take it to be clear that the Court below erred in rejecting it; and that the former decision of this Court, reported in 9 Ind. R. 572, reversing the case for that cause, should be adhered to.

It is believed that the answers to those inquiries will substantially embrace every matter in controversy, and every collateral consideration properly connected with the case under this submission, as limited by the Court.

Before proceeding to the examination of the inquiries suggested, a few things may be pertinently premised.

1. The decision in 9 Ind. R. reversing this case, was the unanimous opinion of the Court, as then constituted, as to the point on which it was reversed. Were the Court now constituted as it then was, it would not be necessary, nor perhaps proper, to allude to the case in detail, either as to law or fact. In such case, the discussion might properly be limited to the specified bills of exceptions.

As the Court is now constituted, it is different. The new judges cannot be expected to fully appreciate these isolated points, without carefully considering the whole case, and the relations of the open questions to those that are closed. In other words, in granting the rehearing, the new judges have assumed the task of making themselves fully masters of the allegations and proofs. This, it is not doubted, they will do.

2. It is further suggested that in trials by the Court, a wider range is usually indulged in the admission of evidence than in trials by jury. And the reason is obvious. After the case is all heard, the single mind of the Court, trained to such inquiries, can more easily separate the relevant from the irrelevant evidence, than can the varied and clashing views of twelve jurymen, unused to the application of legal principles. Hence, as to the admission of evidence to a Court or to a jury, there is an obvious and just distinction. The one can separate the wheat from the chaff; the other cannot. In trials by the Court, it is, therefore, quite immaterial what evidence is adduced; and it is usually so treated in practice. The Court briefly says, we will hear the evidence and determine its relevancy hereafter.

But the same considerations do not apply to the exclusion of evidence. If evidence is excluded, it has, of course, no effect on the mind of the jury, or of the Court sitting as a jury. The theory is, that the one mind or the twelve minds pass only upon what is judicially submitted to them as evidence. The



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excluded evidence is entirely lost sight of. However pertinent or important it may, in fact, be, or however improperly or unjustly excluded, it still has no influence whatever on the decision.

Hence, as to material evidence which is excluded, it can make no difference whether the Court excludes it from the jury, or from itself sitting as a jury. It is equally error—equally prejudicial to the party against whom the exclusion is made.

3. In the third place, it may be further suggested, that this case has had a singular judicial history.

When it first came to this Court, it may be said to have come in at the back door. It is reported in 7 Ind. R. 147. It will be seen that, according to the rules and established practice of the Court, it was not entitled to any consideration. It was not judicially before the Supreme Court. There was no final judgment from which an appeal would lie. Repeatedly—nay, it may be better stated invariably—had cases been dismissed which were thus prematurely brought to this Court. The judgment appealed from was a mere judgment on demurrer as to the sufficiency of a part of the complaint. It did not decide the whole case. The complaint was held insufficient for a rescission, but sufficient for the recovery of damages. On this last branch of the case, there was no issue, trial, or judgment whatever. Hence, there was no final judgment; and from such only an appeal lies to this Court. 2 R. S. p. 158. The jurisdiction of the Supreme Court is wholly statutory; and where jurisdiction is not expressly given, it is not possessed. The principle has been repeatedly recognized in this Court, in the following among other cases: *Chandler v. Soisher*, 2 Ind. R. 222; *Bradley v. Bears*, 4 id. 186; *Fobes v. Martin*, 5 id. 452; *Brancham v. The Fort Wayne, &c., Railroad Co.*, 7 id. 524; *Skroyer v. Lawrence*, 9 id. 322; *French v. Lighty*, id. 475.

Even in this very case, in 7 Ind. R. *supra*, the Court say: "The cause has not been brought to a final hearing on the merits, but only to the point where the Court below ruled that the plaintiff could not have a rescission." And again:—"The cause is not at present properly before us, and ought not to be here."

Yet it was, with great reluctance on the part of the Court, considered and sent back reversed. The argument tenaciously urged for that course was, that the appellees only wanted a fair trial on the merits.

This reversal was clearly a gross departure from both principle and practice, to the prejudice of the appellant.

Judge BRYANT, trammelled by that decision of the Supreme Court, rescinded the contract; and on appeal by *Gatling*, this Court say, "Judge BRYANT's decision on the evidence is conclusive. We will not disturb the finding on the facts."

But the lower Court excluded certain evidence which should have been admitted. For that error the case is reversed. The appellees petition for and obtain a rehearing. The appellant objects, but fails to file a formal petition for a rehearing in sixty days. This, the Court holds, concludes the appellant on the points decided against him—thus holding the latter to the strictest rules of the legal game.

We do not complain of this. Yet, as the appellees had brought their case here, in the first instance, "out of time and out of tune," without a shadow of jurisdiction in this Court, and had an opinion in their favor, it would seem but



fair and equitable, and, as some members of the Court understood it at the time, that they should have been put upon terms—that they should take their rehearing as to the whole case. That their good luck was accidental, as it undoubtedly was, renders it no less prejudicial and ruinous to the appellant. For the point on which the case was reversed against the appellees was by no means the strongest point made by the appellant against the judgment below. There are other points which, if an unbroken chain of authority means anything, or is anything, ought to have settled the appellees' case against them to all eternity. To some of these points, it will be our duty to presently call the attention of the Court—stating the purpose for doing so at the outset.

Perhaps the point on rehearing may be plausibly decided either way. And, as *Burns* says of the pulpit, perhaps even that error might be nailed with a legal text seeming to support it. In that event, the appellant would stand, at the end of the game, beaten on one of the plainest cases, both as to law, equity, and fact, which ever came before a Court.

\* \* \* \* \*

4. In the fourth place, it may be further suggested that this case has a singular history as developed in the record. Almost all that the appellant could ask is, that the judges who granted the rehearing should carefully read the record. That record, on the very first blush, discloses a history conclusive against the appellees.

The parties to the contract rank high in the community in position, attainments, and varied experience. It is not easy to conceive how such parties could possibly practice any species of fraud upon each other, about so simple a machine as a wheat-drill. The appellees would scarcely concede their inferiority to the appellant in point of intellect and general information. Yet their whole complaint is an elaborate asseveration of the appellant's superiority over them, and their own ignorance, alike of the simplest machinery, and of the general topography of the adjoining states.

It is quite easy to see how an unsophisticated farmer, fixed like a plant to his farm, might be circumvented. It is quite possible to conceive how a plausible man of the world might play on his ignorance, and fan his cupidity, with improvident and even ruinous contracts. Such things are not uncommon. But how the appellant could prevail over men of the age, experience, and shrewdness of the appellees, about the qualities of a machine so simple in its construction, and so open to the observation of the most ordinary capacity, is something quite beyond comprehension. The very intimation of such a thing seems more like a hoax than a reality.

What! Did not the appellees see the machine they were buying? and could they not judge of its adaptation to the culture of wheat in this or that locality, as well as the appellant? It would be amusing to hear these gentlemen explain by what magic the appellant persuaded and convinced them fraudulently of a fixed fact, as well known to them, or which ought to have been as well known to them, as to him—viz., that *Michigan* was a wheat-growing country. \* \* \* \* \*

Had these gentlemen sued the appellant for seducing two eminent members of the bar from the practice of the law into the devious paths of patent-right peddling, for which they had no capacity, their right to recover could be scarcely controverted.

If the first blush of the thing is thus preposterous, the details are equally so.

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It is not proposed to enter on the evidence, but only to exhibit a few dates, whose "mute dumb mouths" speak volumes of the time, opportunity, knowledge, and means of knowledge, of what they were buying, possessed by the appellees. We respectfully invite the particular attention of the Court to these dates.

In September, 1850, *Beach* bought four counties in *Ohio*.

November 20, 1850.—*Newell* and *Beach* (*Peaslee* a silent partner) purchased the right to *Michigan* and *Minnesota*.

November 20, 1850.—The former deed to *Beach* was canceled, and the four counties he had purchased on individual account were embraced in the same deed with *Michigan* and *Minnesota*.

December, 1850.—*Beach* and *Peaslee* visited these four counties in *Ohio*, and that state generally.

December, 1850.—They procured in *Ohio* a large number of certificates from the farmers who had used the drill, in favor of its utility and value.

December, 1850.—*Beach* and *Peaslee* had a power of attorney from *Gatling* to sell territory in *Ohio*.

December, 1850.—*Peaslee*, with the knowledge of *Beach*, sold *Preble* county for 150 dollars.

January, 1851.—After an absence of four weeks, they returned to *Indiana*.

February 5, 1851.—*Beach* and *Newell* made the second purchase of twenty-eight counties in *Ohio* for 3,000 dollars.

April 17, 1851.—They went to *Urbana, Ohio*, examined the *Minturn, Allen & Co.* contract for themselves, and indorsed thereon as follows, viz.: "Having purchased the territory for which the within contract was made, we do hereby agree to conform to its terms. *Newell* and *Beach*."

March 5, 1851.—*Newell* and *Beach* wrote to their agent, *Nelson*, saying that *Gatling* had shown them a copy of the *Minturn, Allen & Co.* contract, by which *Minturn, Allen & Co.* were to pay 10 per cent. premium on each drill.

In March, 1851, and also in April, 1851, *Newell* and *Beach* knew precisely the terms of the *Minturn, Allen & Co.* contract.

May, 1851.—*Beach* went to *Michigan* on the business of the drill, and was absent some three weeks. This is all they ever did.

July 15, 1851.—*Gatling* left *Indiana*.

During the years 1851, 1852, and till the spring of 1853, *Gatling* had known agents at *Lebanon* and *Indianapolis*.

March 12, 1853.—*Beach* proposed to negotiate, and wrote to *Gatling* a proposition to take back territory on the notes then due; but not a word of fraud or rescission.

Two years and a half intervene between the first purchase by *Beach*, in September, 1850, and his last proposition in March, 1853; and during all that time, and up to the latter date, and in his letter of the latter date, he makes no pretense, even, that he had been defrauded, or that he expected to seek his remedy by rescission.

So much for the language of dates, as illustrative of the merits of the case. Such means of knowing—time to reflect, and be informed—and such acts of confirmation—would have justly sealed the fate of a case having merit in it—much more such a case as this.

Add to all this these significant facts:

1. They never attempted to introduce the drill in *Minnesota*.



2. They never manufactured a single drill, or used the rise-and-fall tooth drill.

3. They incumbered the territory in various ways, so that it was impossible to put themselves or *Gatling* in a position to rescind.

There are also some additional dates of great importance.

*August, 1853.*—This suit was commenced. The deed said to be tendered before suit, purports to be dated *May 3, 1853.*

*August 31, 1853.*—The deed above mentioned was tendered to *Gatling.*

*September 13, 1856,* is the date of the second deed tendered in Court.

*September 17, 1856,* the date of the tender.

The deed of *May, 1853,* tendered *August, 1853,* is so obviously defective, conveying but a part of the territory, that they themselves abandoned it by the second deed of *September, 1856.* It is accordingly treated as though no deed had been tendered before suit brought.

Such is the foundation laid by the appellees for a rescission.

In addition, no one of the alleged acts of fraud is sustained by the evidence. On the contrary, on each point, the evidence makes a strong case against the immaterial and frivolous allegations of the complaint. In brief, with all respect in the world, alike for Judge BRYANT and for this Court, there is no case made for the plaintiffs on paper—none in evidence. Even if the complaint were above suspicion, there is an utter, total failure of proof.

In the suggestions above made, and such suggestions as may be further made, there is no purpose of pressing a reconsideration of any point which this Court has, under its rules, held to be closed. Any such object is expressly disclaimed. The sole purpose of these preliminary suggestions is, to show the Court, as now constituted, that this is not one of those evenly balanced cases which should lead judges to throw doubts, if they had any, in favor of the appellees. The equity of the case requires, as we expect to show further, that if there are any doubts, they should be thrown in favor of the appellant. Every judge has felt that in some cases the equity and justice is so strong one way, that if the merits could be reached, it should be done. But on the part of the appellees, this is not one of those cases. And the purpose of these preliminary suggestions, made and to be made, is to call the attention of the Court to the case, as it appears in the record. We respectfully submit that, on such examination, it will be found that the appellees have not a shadow of equity in their case. The great fact which we respectfully assert, and which stands out all over the complaint, and all over the evidence is, that there is nothing—never was anything—and never can be anything—entitling the appellees to a rescission. It would be a sad reproach to the Courts, if such a case as the complaint and the evidence disclose should ultimately prevail.

Accordingly, then, not with a view to reopen any point which the Court deems closed, as to this case, but solely for the purpose above intimated, the attention of the Court is respectfully called to the following further suggestions:

To justify the assertion, that there is no case in the complaint, let a few well settled rules suffice.

In relation to the joinder of claims, the established doctrine under the old practice has been that you cannot join a claim for damages for the breach of a contract, with a claim for a rescission of the same contract.

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It is not proposed to examine this question much in detail, or with special reference to the new practice. The legislature may repeal and remodel, and use new language; the Courts must follow *pari passu* with their rules of construction, and give the legal purport of new enactments. But there are some things which the legislature, even, cannot do. They cannot enact that a thing exists, and does not exist, at the same time. They cannot enact that a party may reap the benefit of a contract, and also rescind it, in the same action. That difficulty lies behind statutes. It exists in the very nature of things; in the choice of remedies, to sue on a contract, or sue to rescind it. This difficulty cannot be cured by statute. Rescission and damages cannot both arise to the same party on the same contract. They are incompatible. A demand of the one waives the other. An action to rescind waives damages for the breach; so an action for damages for the breach affirms the contract, and demolishes the right to seek the remedy by rescission. Thus, under the old practice, the analogy of alternate remedy was familiar. If *A.* sued *B.* for the value of a horse which the latter had tortiously taken, the very form of the action necessarily waived the tort. It is not presumed, that, under the new practice, *A.* could, in the same paragraph, claim the value of the horse, and also a return of the animal itself besides. This would not be comprehended in the specific prayer for the value of the horse, and "other proper relief." *A.* might elect his remedy—he might go for the value of the horse, or for the horse itself. He could not have both.

The object of a rescission is to place the parties in *statu quo*; to restore them to the position in which the contract found them. It operates as a comprehensive replevin to restore to each his own property. This results from annulling the contract, and placing the parties as though it had never been made.

But it is very different when damages are the object of the suit. The very basis of the action is, that the contract still subsists and is affirmed. Each retains whatever he may have received from the other. The one alleges that, by the fraud of the other, he has not enjoyed his contract as he should have done. Therefore he sues for damages. The fraudulent party is mulcted to compensate for the injury which his frauds had occasioned; and the contract in other respects stands affirmed.

This is the first case in modern times where both remedies have been sought, and so far as the decision of this Court in 7 Ind. R. 147 is concerned, has unfortunately been enforced. That decision may not fully disclose all the facts; but such are the facts. It was hoped that the Court would have felt at liberty to review that decision in the very case in which it was rendered. For reviewed and overruled it must be, sooner or later. It is simply preposterous to talk of annulling a contract and claiming rights under it, or damages for its breach, at the same time and in the same action. *Newell* and *Beach* should have elected to pursue the one remedy or the other. They could not avail themselves of both remedies. If they elected to rescind, they waived whatever damages they might have sustained by the alleged breach or fraud of *Gatling*. If they went for the damages, they adopted the contract. This is the general, the invariable, doctrine of the books, in relation to executed contracts like that at bar.

In confirmation of this position, I now respectfully beg the attention of the



Court to the very language of some of them—the very essence of elaborate opinions reviewing the ancient and modern authorities on this point.

Thus, in *Lloyd v. Brewster*, 4 Paige, 537: A party to an agreement cannot affirm the contract in part, and rescind in part, so as to maintain assumption for the part he claims to rescind. See, also, *Lyon v. Bertram*, 20 How. 149.

The rescission of a contract necessarily destroys the party's remedy upon it, or even upon a guaranty for its performance. *Smethurst v. Woolston*, 5 Watts and Serg. 106.

If a party would rescind, the rescission must be entire; he cannot consider the contract void, for the purpose of reclaiming his property, and at the same time consider it valid for the recovery of damages upon it. *Jenkins v. Simpson*, 14 Maine R. 304.

In the leading case in the *English Courts*, *Hunt v. Silk*, 5 East, 449, the defendant, in consideration of £10, agreed to let a house to the plaintiff, repair it, and execute a lease therefor in ten days. In the meantime, the plaintiff was to have immediate possession, pay the rent, and execute a counterpart to the lease. The plaintiff paid the £10, and took possession; but the defendant failed to execute the lease, or make the repairs, within ten days. Instead of abandoning the premises, and treating the contract as rescinded, at the end of the ten days, the plaintiff still remained in possession beyond that time. The question was, whether the plaintiff could, by leaving the house for the defendant's default, rescind the contract and recover the £10 in an action for money had and received. The Court held the plaintiff too late to rescind; that his remedy was on the contract for its breach, and ordered a nonsuit. On a rule, &c., Lord ELLENBOROUGH held, delivering the opinion in colloquial style—"If the defendant fail to repair at the end of the ten days, and you intend to rescind, you must make your stand there, and not proceed to a further continuance in the house under the agreement. You have the benefit of the ten days' occupation, and after that time there is no rescinding the contract." With the further observation, that the party could not both rescind and enjoy the same contract, the rule was refused. This case, in 5 East, is quoted so often in our own and other reports, that it was deemed proper to give its substance. It was delivered in 1804, and has been cited and followed as a standard authority on that branch of the law ever since.

The case which repeated citation has made a leading one in the *American Courts*, is *Masson v. Bovet*, 1 Denio, 69. The facts in that case were, in substance, that *Bovet* was a *Swiss*—spoke *French*, understood *English* imperfectly, and had been in the country only a few months. Through the misrepresentations of *Masson*, he had been induced to purchase one hundred acres of land at sheriff's sale. *Masson*, knowing that there were prior liens to more than its value, represented to *Bovet* that it was clear of all incumbrances, except his (*Masson's*) judgment, on which it was to be sold; repeatedly urged him to buy; that it was a great bargain, &c.; and on the day of sale, notified him of the time and place. *Bovet*, immediately on discovering the fraud, offered to restore, &c., brought suit to rescind, and on the trial had judgment. After alluding to the facts and the authorities, the Court lays down the following rule, so often and so extensively quoted and followed by other Courts since, viz.: If the party defrauded would disaffirm the contract, he must do so at the earliest practicable moment after the cheat is discovered. That is the time to make his election; and it must be done promptly and unreservedly. He must not

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hesitate; nor can he be allowed to deal with the subject-matter of the contract, and afterwards rescind it. The election is with him. He may affirm or disaffirm the contract; but he cannot do both. If he concludes to abide by it, as upon the whole advantageous, he shall not afterwards be permitted to question its validity.

In both these cases, the plaintiffs sought only to restore what they had received, recover what they had parted with, and to that end, to rescind. The one delayed, enjoyed the contract partially, and rescission was refused. The other promptly offered to restore, demanded what he had paid, and rescission was decreed accordingly.

In *Junkins v. Simpson*, 14 Maine R. 364, the action was replevin for a yoke of oxen. The parties had exchanged oxen—*Junkins* giving 10 dollars to boot. The oxen exchanged by *Junkins* had been previously mortgaged for 14 dollars, which the mortgagees sought to enforce. On discovering this, *Simpson* drove back the mortgaged oxen, and reclaimed those he had owned before the exchange. *Junkins* brought replevin for the yoke thus reclaimed by *Simpson*. Concurrently with reclaiming the oxen, *Simpson* did not return nor tender the 10 dollars boot. In the Court below *Junkins* had judgment. On this state of facts, the Court held—

1. That *Simpson* had a right to regard the exchange of the mortgaged oxen as fraudulent; but that the contract was not void—only voidable at the election of the party defrauded.

2. The party having such election must rescind the contract wholly, or in no part; that he could not keep the boot, and yet reclaim his own oxen too; that if he intended to rescind, he should have returned the 10 dollars, as well as the oxen received in exchange.

In *Rowley v. Bigelow*, 12 Pick. 307, SHAW, C. J., says: "It depends on the party alleging the fraud, whether the sale is voidable. He may avoid it if he so elect. He has his choice. He may treat the sale as a nullity, and reclaim his goods; or affirm it, and claim damages."

So PARSONS, C. J.: "The purchaser may return the unsound horse, and the boot, if any; or he may retain the horse, and sue for damages.

So in *Shields v. Potter*, OAKLEY, J., says: "They could have continued to receive the iron (inferior in quality), or they could have refused, and repudiated the contract. They could not do both. They were bound to either affirm the contract, or rescind it. They could restore the iron already received, and sue for the payment made; or they could receive the iron, and sue for damages for breach of contract. But they could not retain the part of the iron delivered, and sue at the same time for the money they had paid."

In *Brainard v. Holsapple*, 4 Iowa R. 485, the Supreme Court say: "The rescission of a contract is the converse of a specific performance. It requires a stronger case to procure a rescission of a contract, than to resist a specific performance of it."

In *Remar v. Nullin*, 3 Iowa R. the Court say: "*Nullin* will not be permitted to hold the land received in exchange, sell and dispose of it for a price, and then come into a Court of chancery, and procure its aid to rescind. He must, within a reasonable time, first place, or offer to place, the other party in *statu quo*. The evidence shows that he occupied the *Nolan* farm and improvements for two years, and then sold them for 160 dollars. To grant the relief sought, under such circumstances, would be to contravene one of the plainest



principles of equity. He was bound to do equity on his part, by restoring the consideration received by him, before he could be relieved in a Court of equity. He cannot avail himself of the benefit of the contract, and then call successfully on the Courts for a rescission."

In *Barickman v. Kuykendall*, 6 Blackf. 21, this Court say: "The vendee, having occupied the land several years, under the contract, receiving the rents and profits, the parties could not be placed in the same situation they were in before the contract was made; and consequently, if the contract was valid, the vendee could not rescind, and sue in assumpsit for the money paid."

So in *Bruen v. Hone*, 2 Barb. 586. "There are," says the Court in that case, "other reasons why the plaintiff's claim ought not to be successful in this suit. A leading principle of jurisprudence is, that he who seeks equity must do equity. By the agreement which is sought to be rescinded, he received a release for one hundred and thirty-six out of two hundred lots of land, free from the incumbrance of a debt for which they were pledged. He does not in his bill offer to restore these lots to their former position. Nor indeed can he do so. For it appears that he has assigned them and passed away from himself all control over them. To grant the prayer of his bill now, would be to secure to him all the benefits of the contract, yet release him from a very important part of its obligations."

But *Newell* and *Beach* seek, on the one hand, to rescind and to recover what they had paid *Gatling*; and, on the other, 600 dollars for their damages, expenses, &c., and 10,000 dollars in damages. In brief, they seek rescission, and also to confirm the contract by giving a judgment for its breach. For this incongruity, and in view of the leading cases just cited, and hundreds of others following their lead, scattered all through the books, it is clear that the complaint was radically bad on demurrer.

The ruling of Judge BRYANT, sustaining the demurrer as to the rescission, was clearly correct—was the clear law of the case, and should have been sustained.

It is well known that complaints for rescission were formerly of chancery jurisdiction. That species of relief was administered by decree to all the parties in interest. But it was only upon terms. The party seeking that relief must have placed himself in a position to be entitled to it. To enable the chancery Courts to carry out their favorite maxim of administering complete equity in such cases, there were several well established rules of equity pleading, by which a bill for rescission was to be tested. To these rules, in brief, allusion will presently be made.

While the new practice has abolished the distinction in form between law and equity, and changed the mode of adducing evidence and the form of trial, it is not presumed that rescission can be had on any easier terms than formerly. The rule as to the material allegations of the complaint must be the same. The plaintiff must still make out a case by proper allegation. The change of forum has not changed the law. It is equity administered indeed in a different form, but still, in substance, equity as it heretofore existed. The legislature did not attempt to change the thing, but only changed its name and its drape-ry.

It still remains the law, that every material statement and allegation essential to a good bill in chancery, for rescission under the old practice, is still essential in a complaint for the same purpose under the new. In this respect,

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*VanSantvoord, Morrell*, and other practice text writers in *New York*, reviewing the practice decisions of that state, all concur. The code, they say, adopts substantially the equitable modes of pleading with the legal mode of trial. It leaves legal and equitable principles in all their vitality, to be applied as the exigency of each case may require.

What, then, was essential, and is still essential, in a complaint for a rescission?

It is not enough to aver that the complaining party was defrauded; or that an improvident contract was made. All that might be admitted, and yet *Newell* and *Beach* would not be entitled to have the contracts in question rescinded. At the very threshold of their case, they are met with such well settled doctrines as these, admirably summed up in the second opinion in this very case (9 Ind. R. 576), thus:

"It is not, however, every erroneous representation that will entitle a party to such rescission. The representation must be as to a fact or facts, and go to a material matter. It must be one on which the party to whom it is made has a right to and does rely. If it be mere matter of opinion, or exaggerated general representation of quality, capacity, or usefulness; or be as to a matter equally open to the knowledge of both parties; or be one not relied on; the representation, though untrue, will not vitiate the contract. Especially will such be the case where the parties stand mentally on equal footing, and in no fiduciary relation. The law will not relieve a man thus circumstanced, from voluntarily neglecting to exercise common sense and judgment, if he has them."

So, again, this Court held that, "however much the moralist might censure the address sometimes resorted to by men of keen business habits to effect advantageous contracts, misrepresentations of the value or quantity in market, when correct information on those subjects is equally within the power of both contracting parties, with equal diligence, do not, in contemplation of law, constitute fraud." *Foley v. Cowgill*, 5 Blackf. 18.

"It is difficult," says *Chitty*, "to imagine that a general misrepresentation as to value, the truth of which a party has an equal opportunity of ascertaining; or the concealment of a matter which an individual of ordinary sense, vigilance, and skill, might discover, can in law constitute fraud. Thus, if a purchaser, choosing to judge for himself, do not avail himself of the means of knowledge open to him, he cannot be heard to say that he was deceived by the vendor's representations." *Chit. on Cont.*, 9th ed., marg. p. 591. The authorities on this point are also elaborately examined in the late case of *Lyon v. Bertram*, 20 How. 149, and in the late case in this Court, *Cronk v. Cole*, 10 Ind. R. 485, commonly known as the barley case.

Tested by these authorities, the complaint is radically defective in this particular also. We have already seen that there were two contracts for the patent right of the drill, of 3,000 dollars each. The one was made November 20, 1850; the other, the *February* following. It has been further seen that *Beach* had made a further separate contract some time in *September*, 1850, for four counties in *Ohio*. What were the appellees doing during all the time from *September* till *November*? and from the 20th of *November*, 1850, till the 5th of *February*, 1851? During the time intervening between these purchases, what hindered them from making inquiries and experiments as to the value of their purchase? Nothing. What were they doing? Were they studying the theory



of the drill as a mechanical invention? They might have done so—they had ample time to do so. Were they inquiring of the farmers who had used it, as to its practical operation? Like sensible men, they traversed *Ohio*, making inquiries, procuring certificates of the utility, value, and superiority of the drill. These certificates they had printed. If not good evidence of the facts stated in the certificates, they were good evidence of the knowledge these men had; and that they made the second purchase of *February 5, 1851*, on their own judgment, and not in consequence of any representation of *Gatling*. This investigation was made in *Ohio*. They made the second purchase shortly after their return from *Ohio*. That purchase embraces only *Ohio* territory. And do they now pretend to say they were defrauded in this second purchase—that they did not act on their own judgment?

The parties were on equal footing before, as to the topography of *Ohio*. Its adaptation to wheat culture by drill, was as well known to the appellees as to the appellant. But the appellees did not leave it to presumption, as to the extent of their topographical lore. What they had ample time to do—what it was their right and duty to do—they did. They went to *Ohio* and investigated the whole matter for themselves. Such a course, we should expect, would at once suggest itself to men so prudent, shrewd, intelligent, and vigilant as the appellees are known to be. Nor is it to be doubted that the result of that investigation was highly favorable to the drill, and to the speculation they had already made. For we find them, on their return in *February*, doubling their investment. They purchase other territory to the amount of 3,000 dollars—thus investing in the drill 6,000 dollars. They added twenty-eight counties to the territory already owned by them in *Ohio*. All this they did; and yet, in the face of it all, they aver that they relied upon *Gatling*, and were defrauded!

In point of fact, it is wholly immaterial whether they had so inquired or not. If they inquired as they might have done, and as they did, they were fully informed. They will be presumed to have acted upon their own judgment. If they did not inquire, when they had the time and opportunity to do so, it was their own folly and negligence. Their pretense of fraud is a false clamor, which it is the constant practice of the Courts to discourage. All unfounded allegations of fraud are discouraged by the Courts; and if made, and not established, the plaintiff will not be allowed to resort to any secondary grounds of recovery. *Eyre v. Potter*, 15 How. 56.—*Fisher v. Boody*, 1 Curtis, 211. When, by the exercise of ordinary prudence and diligence, either party may rely on his own judgment, representations, though false, will not be considered fraudulent. *Hobbs v. Parker*, 31 Maine R. 143.

In either event, they have no right of rescission. In the *February* contract, they relied upon themselves. There is not even a possible pretext for rescission there. The *November* contract cannot now be impeached; for the contract of *February* was of itself a solemn act of approval and confirmation of the *November* contract. Here are two contracts about precisely the same subject-matter. Admit that the first is made on the confidence of the representations made by *Gatling*; the second is clearly made on their own judgment. If they were negligently ignorant of the value of the drill, when they made the first contract, they had gone and examined for themselves, and acted on their own judgment when they made the second. The second purchase was made under circumstances in which, according to all the authorities, there could be no fraud. The second purchase so made by the same party, from the same party,

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about the same subject-matter, approves the first, and wipes out and purges from the first, every shadow or pretense of fraud.

If these two contracts could possibly be regarded as only one transaction—parts of the same thing—then they were not completed till *February 5, 1851*. The same argument applies to it as a single transaction, which applies to it as separate contracts—only with still greater force. If, in the language of the books, *Newell and Beach* did know, or with proper diligence might have known, what they were buying, they have no merits—no right to appeal to the Courts to rectify their want of prudence and diligence. *Hough v. Richardson*, 3 Story, 629.—*Foley v. Cowgill*, 5 Blackf. 18.—*Cronk v. Cole*, 10 Ind. R. 485. Before the conclusion of the contract in *February*, the appellees had examined for themselves. Instead of stopping then, and seeking to rescind what they had done, they double their purchase, and thus complete the matter, regarded as a single transaction. If a vendee becomes acquainted with the fraud before completing his contract, equity will not relieve. *Pratt v. Philbrook*, 33 Maine R. 17. Of course the same rule applies where the party failed to exercise ordinary diligence.

Add to this the indorsement of acceptance by *Newell and Beach* on the *Miner's*, *Allen & Co.* contract, *April 17, 1851*, and it would seem to require a considerable degree of presumption to seriously ask a Court to entertain such a case.

Another fatal defect of the complaint is, their failure to tender back to the appellant, before suit, all they had received from him, and its results, in their hands. In other words, they do not show, by their complaint, a readiness to place the parties in *statu quo*. The deed tendered in *August, 1853*, embraced but part of the territory. Hence, they tendered no sufficient deed to the appellant before suit. The deed they tendered after suit, came too late, as we shall presently show.

That deed conveys all the right, title, and interest which *Newell and Beach* then had in the patent. It is simply a quitclaim of their then present interest, without any warranty against their previous acts of lease, sale, &c. It was essential to the validity of any deed tendered for the purposes intended, that it should warrant, &c., against the grantor's own acts. Such a form of deed was indispensable to their right of action to rescind. Even then, if the grantors were shown to be insolvent, such a form of deed would not be sufficient. They could not place themselves in a position to rescind unless they had restored, or offered to restore, everything they had received on the contract, and all its accessions, in their hands. A partial tender was, in legal contemplation, as though there had been no tender.

This complete tender is essential, and should be made before suit. It is simply doing equity, or offering to do equity, by the party who seeks equity. To enable the Court to decree a rescission, the appellees should have made a full exhibit of all they had done under their contract. If they had sold any drills or territory, they should have brought the proceeds, or the securities, into Court. What they had sold or incumbered, they could not tender to *Gatling*. Hence, they could not put him in *statu quo*. It is alleged in the answer, and proved, that they had incumbered the territory. If thus bound to restore what they had received, were they entitled to a rescission unless they could so restore? And on what principle could they keep the proceeds of any sale they may have made? Suppose they had sold one county in *Ohio*, could they,



by tendering a deed for all the residue of the purchase, keep the proceeds of that one county, and still be entitled to rescind? Or suppose they had sold all the territory but one county, could they claim a rescission upon the tender of a quitclaim deed for that one county, and keep the proceeds of all the balance?

The maxim that they who seek equity must first do equity—a maxim so familiar and so just—stands right in the way of a rescission on such a state of facts as this record presents.

In the foregoing suggestions it is assumed that to entitle a party to rescission, the consideration received must first be restored—the parties must be placed in *statu quo*. To this proposition the attention of the Court is now respectfully invited—more particularly as this proposition has been greatly impaired by the opinion in *Gatling v. Newell*, 9 Ind. R. 572—and that, too, as we respectfully conceive, without sufficient warrant from the authorities.

To clear the question of fog, let it be premised that there is no pretense in the complaint that *Gatling* had so confused the property received by him on the contract as to be unable to restore. All that doctrine of the books about the confusion of goods, &c., is wholly inapplicable to the case as to *Gatling*.

This confusion-of-goods doctrine is, however, unfortunate for *Newell* and *Beach*. If they, while they seek to rescind, have so confused, incumbered, or disposed of what they received from *Gatling* on the contract, that they cannot identify, or restore, &c., then this doctrine has a very potent application. In such circumstances, they are not entitled to a rescission. In that event, their remedy is on the contract for damages—not by rescinding it.

These things premised, the proposition above announced is best determined by the authorities. And first our own.

The contract will not be rescinded when the contracting parties cannot be placed in the identical situation which they occupied when the contract was made. *Shaeffer v. Sleade*, 7 Blackf. 178.

One party to an executed contract cannot rescind it without restoring the other party to his original situation. *Buell v. Tate*, 7 Blackf. 55. To the same effect, *Calhoun v. Davis*, 2 Ind. R. 532.

A contract cannot be rescinded by one party for the default of the other, unless both parties can be placed in the same situation in which they stood previously to the contract. *Chance v. The Comm'rs, &c.*, 5 Blackf. 441.

So while the obligee of a title-bond held possession both of the land and of the bond, he could not claim a rescission of the contract. *Osborn v. Dodd*, 8 Blackf. 467.—*Brunfield v. Palmer*, 7 id. 227.

A party who would rescind a contract, on the ground of fraud, must return whatever of value he has received upon it, that the parties may be placed in *statu quo*. *Cooley v. Harper*, 4 Ind. R. 454.—*Hardesty v. Smith*, 3 id. 39.—*Wallace v. McVey*, 6 id. 300.

In *Reed v. Rudman*, 5 Ind. R. 409, the return of the property was legally excused.

In *Colson v. Smith*, 9 Ind. R. 9, the tender was made and continued in Court.

There are numerous other authorities, more or less directly to the same point, scattered all through the eighteen volumes of our own Reports. I have quoted the language, to show the stability and uniformity of the rule as heretofore adopted and applied in this Court.

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The same rule is adopted and applied with equal uniformity in other Courts. Their language is far more instructive and satisfactory than any comment of mine. I therefore beg the attention of the Court briefly to some of these authorities.

"Something has been said, that, if a thing was of no value, it need not be restored. That is not the law. It is not enough that it be of no value to the party who should return it, and yet of great value as a link to enable the other party to enforce some right attacked, or remedy growing out of it. At all events, it is not for the party seeking to rescind, to excuse his not returning it, in that way. Here is an authority. Thus, *A.* took a corporation lease, which was void, and assigned it to *B.* It was held that *B.* could not treat the contract as rescinded, and recover the price paid by him, without first reassigning the lease. (And this must be first done before suit, and that, too, when the lease was void, and of no value.)" *Martin v. McCormick*, 4 Sandf. 366.

In the case of *The Matteawan Co. v. Bentley*, 18 Barb. 641, *Bentley* had purchased goods of the company, and given his notes for part of the purchase-money. The company discovered that fraudulent representations had been made, and demanded back the goods without tendering the notes. The Court held that the action to recover the value of the goods could not be maintained, though the notes were produced on the trial, and offered to be surrendered. Accordingly, also, numerous other cases. *Wheeler v. Baker*, 14 Barb. 596.—*Bruen v. Hone*, 2 Barb. 586.

In *Voorhees v. Earl*, 2 Hill, 288, the authorities up to that date, are elaborately reviewed by Judge COWEN, with the following results:

1. That a party seeking to rescind, must first put the other party in *statu quo*, by restoring whatever he had received on the contract; otherwise, he cannot rescind and recover the consideration he had paid.

2. NELSON and BRONSON held—COWEN dissenting on an immaterial point—that the plaintiff cannot rescind in part, even though fraud in the sale should be shown; and that not having attempted to rescind in *toto*, by restoring all that had been received, the remedy was confined to the contract of warranty. Accordingly, also, a party defrauded in a sale or purchase, may rescind the contract by restoring the parties to the situation they were in when they contracted. 1 Barb. Ch. R. 125.

In order to rescind, both parties must be placed in the identical situation which they occupied when the contract was made. Chit. on Cont., 9th ed., p. 750, citing 5 East, *supra*.—2 Young and Jer. 278.

A party defrauded in a contract, has his choice of remedies. He may stand to the bargain, and recover damages for the fraud; or he may rescind the contract, by first returning what he bought, and then recover what he had paid or sold. *Campbell v. Fleming*, 1 Ad. and El. 40.

In another late case, it is said, the decision in *Hunt v. Silk* lays down a very clear and just rule in these cases. The rescission must place the parties in *statu quo*; otherwise, the party seeking to rescind will be left to his action for damages. And where a party elects to rescind, he must return the consideration received before any right of action accrues. It is not enough to notify the party committing the fraud to come and recover the goods. *Beed v. Blanford*, 2 Young and Jer. 278.

In *Norton v. Young*, 3 Greenl. 30, the defendant had exchanged with the plaintiff a recognizance to confess, &c., signed by a third party, for store goods.



The transaction was fraudulent. On discovering the fraud, the plaintiff wrote to the defendant that he would have nothing more to do with the recognizance, and that he should come and pay for the goods exchanged for it. But no offer was made to return the recognizance before suit. In an action for the price of the goods, treating the contract as rescinded, the Court say: "It has been urged that a return of the recognizance to the defendant was not necessary to vest the right of action in the plaintiff, but that as soon as he had given notice of the intention to rescind, his right of action had matured. The cases cited do not support this position. Before any right of action accrued to the plaintiff to recover the value of the goods, the recognizance should have been returned to the defendant. Things must be put in *statu quo* to enable a party to rescind a contract." Accordingly, also, *Kimball v. Cunningham*, 4 Mass. R. 502; *Conner v. Henderson*, 15 id. 319; *Shields v. Potter*, 2 Sandf. 262—opinion by OAKLEY, C. J.

Much more might be cited to the same effect. If the foregoing authorities do not settle the question of rescission on the complaint at bar, against *Newell* and *Beach*, it may be safely asserted that no question can be settled by authority.

The deductions from these authorities are—

1. That unless the whole property, or title, received on the contract, is restored, no right of action can accrue in any case for rescission.

2. That where, as in this case, a deed is necessary, it must be a complete deed—which will secure, and which purports to secure, to the party, all he had parted with.

3. That in such case, a mere quitclaim deed, without the grantor's covenant against incumbrance done or suffered by him, is not sufficient; nor is a deed sufficient which, like that tendered August 31, 1853, does not embrace all the property purchased.

4. That the tender of an imperfect deed is as though there was no tender, and confers no right of action to rescind.

In this case, there was no proper deed tendered before suit. In all the above cases, if a proper tender is not made before suit, and kept up in Court, it is idle to talk about rescission. Situated as they were, the property received so incumbered that it could not be restored, or if unincumbered, was not restored, nor offered to be restored, before suit, they had no right of action to rescind. Their remedy was on the contract for damages. It is further respectfully submitted that the former decision in 7 Ind. R. 147, on demurrer to the complaint, was, in this respect, also erroneous.

Again, as an action to rescind, was this case commenced in a reasonable time? It is proposed to call the attention of the Court briefly and respectfully to this point also, and to the dates already given, and a few cases.

It is true, we are told that this question of reasonable time is a mixed question of law and fact, and as such, passed upon by the Court sitting as a jury. If a question of fact, the rule established by this Court, and uniformly adhered to, is a salutary one, rarely to be relaxed. Yet it has been relaxed several times (*Cook v. Noble*, 4 Ind. R. 221), and should not be regarded as wholly inflexible. If there ever was a case in which it should have been relaxed, it was that at bar. But if the question, whether the application to rescind was made in a reasonable time, is one of law, then the Court erred in the opinion in that behalf in 9 Ind. R. 572.

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That delay is fatal to the right to rescind, has been long and well settled. When a party intends to rescind, he must do so promptly on the first intimation of breach or fraud. If he negotiates afterwards, he waives his right to rescind. *Lawrence v. Dale*, 3 Johns. Ch. 23, affirmed in the Court of Errors under the title of *McNeren v. Livingston*, 17 Johns. 437.—*Brinley v. Tiltlets*, 7 Greenl. 75.—Chit. on Cont. —.—1 Smith's Lead. Cases, 237.—4 Hill, 184.—4 Denio, 524.

If, after discovering the fraud, the party deal with the property as his own, he cannot rescind. Nor would the right to rescind be revived by discovering other incidents in the fraud. *Campbell v. Fleming*, 1 Ad. and El. 40.

Such is the whole tenor of the authorities, especially the modern, overruling the dictum of Lord REDESDALE, in *Murray v. Palmer*, 2 Sch. and Lef. 486, and the dictum of Lord ERSKINE, in *Morse v. Royal*, 12 Ves. 373, so much relied upon, in both printed and oral argument, by counsel for the appellees. Besides, the dicta themselves never had any application to the case; for there is no pretense but that *Newell and Beach*, at the time of the several acts of confirmation, viz., the second contract, in February, 1851, the indorsement of the *Minturn, Allen & Co.* contract, in April, 1851, and the letter of *Beach*, in March, 1853, knew all about the subject-matter they had purchased, and confirmed it with their eyes open. The dicta of REDESDALE and ERSKINE have, therefore, no application.

The modern authorities do not say, nor do we pretend that they say, that acts of confirmation will deprive the party of all remedy in a contract tainted with fraud. What we do say is, that according to those authorities such acts of delay, or of confirmation, deprive the party of his remedy by rescission. He is still left his right of action for damages. The modern authorities hold such acts to be an affirmation of the contract—as evidence of his election to look for his remedy to an action on the contract, and not to a rescission of it.

If, therefore, the party delays to seek his remedy by rescission; or if he deals with the property after the discovery of the alleged fraud; he forfeits his right to rescind. So it is settled in *Indiana*. In *Cain v. Guthrie*, 8 Blackf. 409, it is held that if a party desire to rescind a contract on the ground of mistake or misrepresentation, he should promptly communicate the facts on which he relies, and his intention to rescind, to the opposite party. To the same effect are *Johnson v. M'Lane*, 7 Blackf. 501, and *Shaeffer v. Sleade*, *id.* 178.

A contract will not be rescinded unless the application be made within a reasonable time. 8 Blackf. *supra*. In the leading case already cited, *Masson v. Bovet*, *supra*, the Court say, he will have his remedy by rescission, provided he seeks that remedy by returning what he has received, at the earliest moment after he has knowledge of the fraud.

So applications to rescind must be made as soon as the cause for rescission is discovered. *Ayres v. Mitchell*, 3 Sm. and M. 683.

As to what is a reasonable time—is it a question of law, or of fact? We proceed to respectfully and briefly state a few authorities out of a large number (in opposition to the opinion of this Court, in 9 Ind. R. *supra*), that it is purely a question of law, and not a mixed question of law and fact.

Thus, whether application to rescind has been made in a reasonable time, is a question of law for the Court, and not of fact for the jury. *Holbrook v. Burt*, 22 Pick. 546.

In *Kingsley v. Wallis*, 14 Maine R. 57, the suit was on a note for the pur-



chase-money of an interest in a patent right. The deed and note were dated April 9, 1834. The defendant reserved the right to rescind if he could not sell the patent right, or if he got sick of his bargain; but no time was fixed. In June following, he offered to give up the bargain, and return the deed to the plaintiff, and demanded his note. The Court held—

1. That what, in such a case, was a reasonable time to rescind, was a question of law.

2. That a delay of two months and a half before making the offer to rescind, was beyond a reasonable time.

The decision on the circuit, made by WHITMAN, C. J., was affirmed on appeal.

This case is not merely analogous to that at bar; it covers it completely. Accordingly *Ragan v. Gaither*, 11 Gill. and Johns. 472; 8 Johns. Ch. R. *supra*; 2 Greenl. 249; *Warren v. Daniels*, 1 Wood and M. 90.

It has been seen that *Beach's* first contract for the patent, was in September, 1850; the second, November 20, 1850; the third, February 5, 1851. *Gatling* left the state in July, 1851, about ten months after the first, eight and a half after the second, and nearly six months after the third contract. Two or three days would have sufficed to carry *Newell* and *Beach* to either of the territories they had purchased. Was it due diligence in *Newell* and *Beach* to slumber over their purchase thirty months, when the value of the drill could have been tested and ascertained in as many days? Even on the face of the complaint, it is apparent that they had ample time to ascertain every fact alleged to operate as a fraud, and that, too, long before they made the second contract, in February, 1851; long before they indorsed the *Minturn, Allen & Co.* contract, in April, 1851; long before *Gatling* left the state, in July, 1851; long before *Beach* wrote his negotiating letter, in March, 1853.

Equity does not give parties forever to discover defects or fraud, any more than to elect what they shall do about it when it is discovered. Equity does not subserve negligence, nor extend its remedies to improvident contracts. \*

\* \* \* \* \*

The appellees had, by their own showing, ample time to investigate, and make themselves acquainted with the whole thing. They complain of the *Chicago* contract. Was there not such a contract, and a profitable one, too, for *Mayhew*? Even had it been otherwise, *Indianapolis* and *Chicago* were not twenty-four hours apart; *Mayhew* was almost their next-door neighbor. What hindered them to investigate that matter sooner? So of the *Minturn, Allen & Co.* contract; *Indianapolis* and *Urbana* were connected pretty directly by railroad. Why did they not, when in *Ohio*, in the winter of 1850, seek *Minturn, Allen & Co.*, and ascertain the facts for themselves, before they made the second contract, in February, 1851? \* \* But they did, afterwards, seek *Minturn, Allen & Co.*, and did, on the 17th day of April, 1851, with the contents of that contract before them in all their length and breadth—with *Minturn, Allen & Co.* before them, face to face, with their own hands, wipe out every shadow of fraud by the following indorsement:

"Having purchased the territory for which the within contract was made, we do hereby agree to conform to its terms. *Newell and Beach.*"

It would be highly instructive to see the learned counsel produce authority to do away the proper legal effect of that indorsement. The dicta of *ERSKINE* and *REDESDALE* don't meet the case.

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But they allege that *Gatling* left the state in *May*, 1851, and did not return till the spring of 1853; and that, hence, they could not proceed to rescind. We take them at their word, though it is contrary to the fact. Under the authorities above cited, they were then too late. They had slumbered some six months. But what if he was out of the state? Did that hinder them from filing their bill to rescind, and continue for process? And what had become of the process by publication, or of attachment, during that time? Besides, *Gatling* had agents at *Lebanon* and *Indianapolis*, of whom they could have made inquiry. Their complaint alleges no sufficient excuse, because they have shown in it no diligence in making inquiry for *Gatling*. The rule is this: A party alleging and relying on ignorance, must show that he used due diligence to obtain information, and that, too, in vain; or that he could not have obtained the necessary information by the use of such diligence. *Wasson v. Waring*, 15 Beav. 151.

Nowhere, in the complaint, is it alleged that they used any diligence whatever to find either *Gatling* or his agent. Not a word of it. But in the face of all these facts—the equality of the parties; the length of time elapsed before suit, or notice of intention to rescind; the length of time between the *November* contract and the *February* contract, affording such facility of inquiry; the utter failure to prove fraud in the *Chicago* contract; the indorsement of the *Minturn*, *Allen & Co.* contract; the failure to tender back all they had received, before suit was brought; and the overwhelming evidence of the value and utility of the drill; in the face of all these, the case is still urged on, \* \* \* \* \* no matter what acts of negligence, what acts of confirmation, or what acts of waiver the appellees might have done, or what fatal *hiatus* there might be in their complaint and their proof.

To me it seems a perfectly plain case—a clear, legal, open-and-shut against *Newell* and *Beach*, without even a shadow of merit. It is one of those cases in which, according to the authorities, the Courts should be astute to check such groundless charges of fraud. The authorities cited fully sustain Judge *BRYANT*'s first opinion, in holding the complaint insufficient for rescission.

\* \* \* \* \*

The evidence shows what could be done with the drill in *Illinois*, when it was in the right hands. The success in *Illinois* fully justified every representation of value, utility, and the profits to be realized upon it, made to them by *Gatling*. There is not a single authority that the mere speculative representation of what a thing would be worth, even if exaggerated and false, was ever adjudged fraudulent. Price, value, and prospective profits, are mere matters of opinion, or at least, of common intelligence. \* \* \* \* \*

I have thus very imperfectly, but with entire respect to the Court, pointed out some of the errors into which it is conceived the Court has fallen, in its former rulings in this case. I have done it the more freely, because I had taken part in these decisions. But the Court, as now composed, can but feebly appreciate the bearing of the excluded evidence, unless they make themselves familiar with the record in all its details, which they will no doubt do.

Let us now inquire—

1. What were the issues joined between the parties?

The foundation of the particular issue which the bill of exceptions applies to, is on record, in these words, viz.:

“The plaintiffs say that the said representations so made by defendant were



false, fraudulent, and deceitful; and that the interest so purchased by them of said defendant, is and was entirely worthless, and of no value whatever."

The corresponding allegation in the second paragraph of the complaint is in these words, viz.:

"That the representations so made were false, and fraudulent, and deceitful, and known to be so by the defendant; and were made by him with the intent and design to cheat and defraud the plaintiffs in the premises; and that the interest so purchased by them of the defendant is entirely worthless, and of no value whatever."

The first allegation relates to the first contract by *Newell and Beach*, of November 20, 1850, and is in the first paragraph of the complaint.

The second allegation relates to the contract of February 5, 1851, in the second paragraph.

The false representations alluded to are, as to the *Minturn, Allen & Co.* contract, which they indorsed; as to the *Chicago* contract, which were substantially true; as to the topography of *Michigan*, which, as in *Cronk v. Cole*, 10 Ind. R. 485, was as well known to them as to him; as to the great profits they would realize from the patent, which were mere opinion, never, as we have seen, held to be fraudulent (9 Ind. R. *supra*); and yet those were the false representations. The prayer was for rescission, or 10,000 dollars damages.

But the great fact in issue, indeed the only material one, was, that the machine itself—the right to sell and use it—was wholly worthless and of no value. This fact was put in issue by denial in various forms. There was a general denial of every material allegation in the complaint. Several allegations of the complaint were denied specifically, and in detail. Thus, among others, *Gatling* denies that the patent right, &c., is worthless, but, on the contrary, alleges that it is of great value. In addition to these numerous detailed denials, the answer sets up various matters of delay, waiver, &c., by way of avoidance. To none of the paragraphs of the answer was there any demurrer, but only a general denial.

Such was the chief issue joined between the parties—the value of the drill, as a patented improvement, being the essence of all combined.

2. What did the trial by the Court embrace?

It is sufficient to say that it embraced all these issues. This proposition needs no comment.

The chief issue, then, being whether the interest purchased by the plaintiffs from the defendant was, as alleged in the complaint, entirely worthless and of no value whatever, was the evidence offered and excluded, pertinent and relevant to that issue?

The burden of proving that the patent interest was worthless, was, by the pleadings, imposed on the plaintiffs below. It was the right and duty of the defendant to rebut and repel it, and show that it was valuable. To do this—to prove that it was valuable—what range and selection of means was then in the power of the defendant?

*Gatling* could not prove its value by actual experiment in any of the territory sold to the plaintiffs, because by his deed of transfer to them, he had necessarily excluded himself from making experiments, or testing the value of the drill, within their territory. He could neither sell nor use the drill in the territory transferred. So that he could not lay the foundation for any such evi-

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dence. In such circumstances, he could neither be expected nor required to produce it.

Nor could *Gatling* glean any evidence from that quarter arising out of the acts of the plaintiffs. For their want of skill and sagacity in presenting the claims of the drill to the public; the fact that they never presented the drill at all in nineteen-twentieths of their territory; the further fact that they never manufactured any drills, not even for samples; and the further great fact that they never even experimented with the rise-and-fall tooth drill—the very thing they had purchased; all these combined, shut *Gatling* out completely from any of the ordinary means of proving the value of the drill in *Michigan*. Their deeds show it was *Gatling's Premium Grain Drill* they had purchased. Instead of that, they experimented with, exhibited, &c., the stationary tooth drill. If they were not such highly intelligent gentlemen, we might well doubt whether they knew the difference. At all events they made no experiments in their own territory with *Gatling's Rise-and-Fall Tooth Premium Grain Drill*, from which *Gatling*, or anybody else, could glean any evidence of its value. If they had, this suit would never have been brought; they could have sold profitably.

So that neither on his own account, or on theirs, could *Gatling* be legally expected to produce evidence of its value from the territory he had transferred to the plaintiffs. There were no means then—no instruments of evidence in that direction, only what of prejudice the plaintiffs had here and there raised against the machine.

What, then, was he to do? He offered his patents from different governments. They were rejected. He offered his medals awarded on various occasions for the best drill in use. They are also rejected. The very certificates of its value, which *Newell* and *Beach* had collected and printed, and which had been embodied in their depositions, are stricken out. What was he to do?

In the language of the fourth bill of exceptions—"The defendant offered to prove, by *James B. Hart*, that there was then a demand for *Gatling's Premium Grain Drill* in the state of *Illinois*, where the drill had been tested; and to prove, also, the value and success of the drill in *Illinois*; and also to prove what sales had been made in that state. The defendant offered to prove this to rebut the charges of fraud and false representations respecting the *Mayhew* contract; and to rebut the charge of want of value in the drill." This was excluded only as to sale and demand prior to the contract, and during the ensuing season.

The fifth bill of exceptions was, that the defendant offered to prove by *Hart* what sales of said drill and territory *Royal Mayhew* had made in *Illinois*—*Mayhew*, the person referred to in the complaint—to repel the charge of fraud, and to show the value and demand for the drill where it was known. But the Court excluded that also, save as to the time prior to the *Beach* contract, and the ensuing year.

Now, then, let us inquire—

1. As to the pertinency of the evidence.
2. The propriety of its limitation.

1. Its pertinency. The pertinency and relevancy of the evidence is admitted by the Court below, in the very act of limitation. Whatever occurred prior to the *Beach* contract, and for the ensuing year, that Court and this Court admit was good evidence. It was relevant in two ways to the case made in the complaint. It was pertinent to the issue of fraud joined on *Mayhew's Illinois* con-



tract. It was pertinent to the broad and all-important issue of any value whatever in the right patented. All this, the Court below ruled as to the years 1850 and 1851, and there is no exception taken on their part. They cannot now complain of it. Their argument against it at this time is about of a piece with our argument against the former decisions of this Court in this case; and will probably have as much weight.

Now this was the best evidence which, in the circumstances of this case, was accessible. It was the only evidence open to *Gatling*.

But it was pertinent and relevant in another sense than anything conceived by the appellees. Suppose, on the introduction of gunpowder, a man having the patent for that discovery, sells the right to make, vend, and use the article there to *Newell* and *Beach*; representing that *Michigan* is one of the best explosive states in the *Union*; that gunpowder will explode there very freely, &c., &c. Having thus sold *Michigan*, the vendor can do nothing in that state in the way of sale. He cannot, consequently, furnish any test of its value directly within that territory. Suppose *Newell* and *Beach* make no proper offers or experiments there either—but taking saltpetre instead, offer that as the explosive substance called gunpowder. They fail. Years after they come back and allege fraud. They say that the vendor falsely represented that *Michigan* was a first class explosive country, where gunpowder would readily explode. Whereas, in fact, gunpowder would not explode in *Michigan*, and, therefore, the right to sell was worthless, and of no value; and for this fraud, they besought the Court to rescind the contract.

This is exactly a parallel case. This mode of cultivating wheat, by a drill, is a process not affected by township, or county, or state lines. Wherever wheat will grow, it remains true that the drill is the best mode of cultivation. It is a process not affected by climate or latitude, in contradistinction to a mere local, artificial application. It is like a machine or process for the application of electricity, or steam power, or gunpowder. It is true that all these will be more or less affected by the state of the atmosphere—that is, in fact, by the climate. Whether in this or that locality the process can be applied profitably in any of them, wheat included, is another question. Wherever wheat is a staple production, the process by drill is applicable. The Court know, as a matter of common information, that both *Illinois* and *Michigan* are wheat-growing states. So is *Ohio*. The Court know, in like manner, that the soil and climate of these states are essentially the same. The difference, if any, is in favor of *Michigan*.

The result is, that a process valuable in *Illinois* for cultivating wheat, must be equally so in *Michigan*. It is alleged in the answer of *Gatling*, and abundantly proved, that the crop by drilling is largely increased over the old-fashioned mode of sowing broadcast. The inference is, that this is the effect everywhere, unless something is shown making *Michigan* and *Ohio* exceptions. This has not been attempted. Hence, when the effect of the drill, and its value in *Michigan*, could not be shown by *Gatling*, as we have seen, directly, the next best evidence was the effect and value of the drill as a process for the cultivation of wheat in the adjoining state of *Illinois*. Its value as such process, was legitimate and relevant to *Gatling's* defense, and pertinent to the issue upon which the parties had rested their case. It was to go to the Court or jury, to enable the tribunal trying the facts to say whether the right to vend and use

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the drill, was, as alleged on the one hand, and denied on the other, worthless or not.

It is not necessary to discuss what was the weight of such evidence—whether it was strong and conclusive, or weak. If it was pertinent to the issue—if it tended to prove or disprove that issue—the party offering it was entitled to it. It was error to exclude it. Had the mind of the Court or jury been on a balance, that very evidence might have turned the scale. It was the last feather that broke the camel's back. This Court cannot tell the effect of excluding pertinent evidence, and, hence, has always held it error to exclude it.

Some authorities on this point, in our own, and other Courts, will be presently added. To affirm the judgment below, this Court will have to overrule a large and most respectable class of cases. But before citing authorities, we will advert to the limitation as to time.

2. The limitation by the Court to the year the patent right was sold, and the ensuing year (1850 and 1851), was also clearly erroneous. *Newell and Beach* had purchased the patent for its whole lifetime. The first years, when new and unknown, were, of course, the least valuable. The ruling confined the evidence to the period most unfavorable to *Gatling*. The purchase was of the lifetime of the patent, and *Gatling* was clearly entitled in evidence to the history and impress which its past career had made. So were both parties. That was the very material—the magazine for both. If in the period from 1850 to 1856, the history and practical operation of the drill had shown it to be worthless, most clearly the appellees were entitled to the evidence. Had *Mayhew*, with every care and skill in introducing the drill in *Illinois*, yet signally failed because of its practical inefficiency, would not the appellees have been entitled to that evidence? Most certainly. And if every year had but demonstrated its inefficiency still more—1856 the most of all—there is no Court in christendom so stupid as to exclude the appellees from such evidence. Why, then, exclude *Gatling's* evidence of its increased favor, practical utility, and value? Is it not as good and legitimate in defense as in the prosecution?

We will now beg the attention of the Court briefly, to a few authorities in relation to the relevancy of evidence, as illustrative of the observations just made.

Thus, opening our own Reports at random, we find,

That any evidence, however slight, tending to prove a material fact, should be submitted to the jury. *Crookshank v. Kellogg*, 8 Blackf. 256.

The rule is, that if the evidence, taken together, tends, however slightly, to prove the party's case, it must be submitted to the jury. *Babcock v. Doe d. Bowman*, 8 Ind. R. 110. And the foregoing case in 8 Blackf. 256, and *Haynes v. Thomas*, 7 Ind. R. 38, are cited.

So in *Harbor v. Morgan*, 4 Ind. R. 158—Whether the evidence offered was a complete defense, was not the question. It was pertinent to the issue. If it tended to support the defense—tended to make a single link in that defense—it should have been admitted.

And it is admissible, if it be the best evidence which the nature of the case will admit—if it is the best evidence of which the case is capable. *Jackson v. Cullum*, 2 Blackf. 228.

So evidence appropriate to one count or issue, though not so to all, must be admitted. *Irving v. Thomas*, 6 Shep. 418.



And it is often allowed to range, owing to the circumstances of the case. Thus, when the issue was as to the quality of wood, and the plaintiff's evidence tended to show that it was mostly unsound, &c., it was held competent for the defendant to show that the standing timber from which the wood was cut, was a good fair lot of timber. *Green v. Donaldson*, 16 Verm. R. 162.

So, in the case of *Abbott v. Wyse*, 15 Conn. R. 254, the matter in issue was the market price of an article at A., the place of delivery; in the absence of proof of the value there, evidence of its value at B., seven miles distant, was offered in connection with evidence that the price at the two places was usually the same; and this was held to be admissible.

Now the Court, in the case at bar, knew judicially, as well as from the evidence in the cause, that *Michigan* and *Illinois* were both wheat-growing states. Can this Court say that the value of the wheat drill in *Illinois* did not tend to support the defense that it was valuable in *Michigan* also?

It is said that this is *res inter alios acta*. Indeed! And yet for the purpose of settling the location of the premises demanded, it is held in *Massachusetts* that the grants of adjacent lands between strangers are admissible and relevant evidence. *Sparhawk v. Bullard*, 1 Met. 25.

It is no objection to evidence that it does not prove the party's whole case. If it be a link in the chain, so it is admissible. *Haughey v. Strickler*, 2 Watts and Serg. 411. It is error to reject evidence pertinent to the issue. *Nearing v. Bell*, 5 HUl, 291.

Evidence conducing to prove the issue should not be excluded. 2 McLean, 596. Evidence tending to prove the issue, though not sufficient to justify a verdict, should be admitted. *The State v. McAllister*, 11 Shep. 139.

It should be remembered, says the *Kentucky* Court, that under the head of relevancy, the question is not whether the evidence offered be the most convincing, but whether it tends at all to illustrate the question. *Holt v. Crumpe*, Litt. Sel. Cases, 499.

So, in the same state, when the question arose whether a slave had been made a gift or present to a newly married daughter, it was held admissible to show that the father had presented slaves to some of his other daughters on their marriage, for the purpose of enabling the jury to determine his intent in that case. *Smith v. Montgomery*, 5 B. Mon. 502.

So facts occurring after, are admissible to explain facts occurring before, the commencement of the suit. *McLeod v. Johnston*, Anth. 16.—*Rules v. Knight*, 8 Mart. (La.) 267.

In support of these considerations, is the language of this Court on this very point, and in this very case, 9 Ind. R. 572, viz.:

"The complaint alleges that *Gatling's* representations of the value of the drill, &c., were false, fraudulent, and deceitful, and that the interest so purchased by them, of said defendant, is, and was, entirely worthless, and of no value whatever.

"Now the question of the then value of the drill and patent was clearly involved in the case, in whatever aspect viewed.

"1. It was one of the issues in the cause.

"2. If, instead of a rescission, the Court should give damages for the fraud, then it would be necessary to know the value of the drill, &c., in order to determine the amount of damages. And,

"3. It was necessary to know the value of the drill, &c., in order rightly to

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determine whether there should or should not be a rescission of the contract." And the whole of page 581 is to the same effect.

The appellees, in their late brief, say: "If the Court had determined that the contract could not be rescinded, but that the appellees were entitled to damages on account of the fraud, then the question of the value of the rights would have been material in order to grant the proper measure of relief. \* \* \* This Court cannot reverse the case on account of the rejection of evidence, material only in the event that the Circuit Court had granted a different species of relief."

It may be observed pleasantly, and with entire respect to opposing counsel, that this is certainly the latest specimen of legal logic.

1. It admits, just as we contend, that in the event of rescission being denied and damages given by the Circuit Court, the excluded evidence was pertinent.

2. The Court was not trying the question simply whether they should rescind or not, or give damages or not; but whether it was a proper case for rescission alone, or damages alone; or whether the evidence entitled the party to either. We admit, and we have shown by the instructions, that it was wholly irregular and anomalous to have issues for rescission, and also issues for damages, pending on the same contract and in the same case. If error, it was the error of the appellees. This Court inadvertently permitted the issues to be so made up. So that the lower Court was trying all together—whether *Newell* and *Beach* were entitled to rescission or damages, or whether the evidence entitled them to either. Yet, according to the logic of counsel, rescission was the only issue—the Court, *Rhadamanthus*-like, was to dispose of the alternate issue in advance, without hearing evidence.

Now, we would beg to know of counsel how the lower Court could determine whether to rescind or give damages, or refuse both, until they had heard all the evidence pertinent to either issue.

Suppose the Court had "seized the bit," and excluded all evidence relating to rescission, and admitted only evidence in relation to damages, how would the gentlemen, in that case, relish their own logic? Oh! they say, the lower Court, having determined to give damages instead of rescission, the evidence relative to rescission was rightly excluded! Suppose the lower Court had further determined against both rescission and damages, and, according to counsel's logic, excluded pertinent evidence as to both—would that phase of the case make their own position more logical and acceptable? Determined! When? How could they determine that or any other question in issue before the evidence was closed? It is preposterous.

One only answer to the quotation from *Starkie* is, that this Court simply look at the connection in which that quotation is found, and examine the authorities we have cited to the same point.

Their "popular favor" doctrine is the most ludicrous part of the case. That any action could accrue on the warranty of such an impalpable, inappreciable, and fickle thing as popular favor, is simply laughable. Why, even politicians, who make the varying shades of popular favor their study, cannot always understand the thing. Besides, the plaintiffs below had the good sense not to put any allegation in relation to popular favor in their complaint. The false and fraudulent representations are alleged to be "that the drill was the best ever invented." Have they alleged or shown that there is, or was, a better drill? "That from its manifest and acknowledged superiority, it would



supercede all others?" What was this but mere opinion? "That they would immediately make immense profits therefrom?" What was this but mere speculative opinion, about which they could judge as well as *Gatling*, and to which, if they trusted, it was their own folly and negligence? "That this drill culture was the best mode of raising wheat." Have they alleged, or pretended to show, that it was not the best? On the contrary, they prove it to be the best by their own witness, *Mayhew*.

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It is very convenient to seek to escape from all these, and many other such facts and issues, under the vague and impalpable fog of "popular favor." They put the value of the drill in issue themselves, by alleging its worthlessness, and demanding that they have either rescission or 10,000 dollars damages. Have they found their position embarrassing, and do they now hope to escape from it by excluding evidence, or by further befogging this Court?

We are done with a case too plain for argument. It was only the erroneous decision in 7 Ind. R. 147, that ever gave so plain a case consequence or consideration anywhere. If it be said that I participated in that, and the subsequent opinion in 9 Ind. R. 592, I answer that I did. But I did not examine the authorities. That, in our Supreme Court, is always trusted to the judge who prepares the case. This has often been thought, and perhaps is, a vice in our judicial system. I can only further say, that I have found those cases, and many others which I not merely consented to, as was the fact in these, but which I wrote, wherein it is clear that the Court erred. So far as I can discover, the great sources of error in our Courts of last resort, in addition to that suggested, is starting upon erroneous premises, or getting upon the track of, and becoming entangled in, a series of ill-considered and anomalous cases. This is the very difficulty in the two cases in 7 and 9 Ind. R. For that same reason, I know of more than one case in which the opinion of the Court was prepared by me, that ought to be overruled. So that there is no possible disrespect to any member of the Court in the freedom of comment used. It was done, because justice and correct legal principles, as applied to *Gatling's* case, required it. I should have been derelict to my client and professional duty, had I done less.

For these reasons, it is respectfully and confidently submitted, that the Court adhere to the reversal in 9 Ind. R. 592. That will deprive the parties of no right, but simply remand their claims to the consideration of a jury of their country.

Mr. *Liston*, for the appellant, concurred in the views of Judge *Stuart*, and added the following:

There are several points in the case, that I would call the attention of the Court to at this time, for the reason that two of the judges now upon the bench heard nothing of the elaborate arguments, by counsel of both parties, when this case was before the Court at any previous hearing.

The points, in addition to those presented in Judge *Stuart's* brief, that I wish to direct the attention of the Court to, are few, but they are points that were presented for the consideration of the Court, at a former hearing. Some are not noticed in the opinion of the Court, as delivered by Judge *Perkins*.

1st. The eighth and ninth bills of exceptions in the record, show that the motions of appellees, on the trial below, to strike out parts of *Peaslee's* and *Mayhew's* depositions, were excepted to, as being made too late, (i. e., after all



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the evidence had been submitted and heard on the trial below); and the statute (2 R. S. p. 88, § 266) was referred to, sustaining us on that point. It is true, the Court held the evidence to be hearsay, or rather secondary; but that was not the point raised by the appellant. One of the main points was, that the motion should have been made before entering into trial, as required by the statute. If this motion had been made and sustained, before entering into trial, the appellant would then have had an opportunity of asking for a continuance of the cause, to have laid the foundation, if necessary, for this secondary proof; and would have been apprised, before the trial, of the objection, so as to have perfected his proof, if in his power. These portions of *Peaslee's* and *Mayhew's* depositions, were copies of documents originating with the appellees. These portions of *Peaslee's* and *Mayhew's* depositions thus stricken out, are not only important in establishing the facts of *Beach* and *Newell* having gone to *Ohio*, and fully examined the drill territory for themselves, but that they, then and there, were fully satisfied, and were well pleased with their purchase; and these documents and acts of theirs, are solemn admissions of facts made by them, and which they cannot, and did not, pretend to contradict, as will be seen by the whole record. This, then, brings me to the second point, to which I respectfully call the attention of the Court.

2d. The solemn, deliberate, and numerous admissions, made time and time again, in writing and otherwise, by the appellees, and which stand out so prominently throughout the whole record, as established facts, uncontradicted, and wholly unimpeached in any manner whatever; and which established facts eviscerate the whole case of *Newell* and *Beach*, and in any, and in every aspect in which it can be viewed, either for rescission, or for damages—even if this Court shall sustain the Court below in the matters stricken out, as set forth in the eighth and ninth bills of exceptions—yet we have the record still remaining, full of the deliberate admissions of facts by *Newell* and *Beach*, uncontradicted, and which could not be more strongly established, if they had been found to exist by a special verdict; and which, if they had been found by a special verdict, would, beyond all question, control any general verdict for the plaintiffs below, and leave not the least scintilla of right, equity, justice, or law, for any judgment in favor of *Newell* and *Beach*, and more especially for that most anomalous of all judgments, rendered by the Court below, in doing what was never attempted to be done before, and it is to be hoped, may never be attempted again—i. e., rendering a judgment rescinding a contract, and in the same judgment assessing damages for its breach. If law is a rule of action, where is *this* rule to be found? The rule never existed. It never can exist, because it is inconsistent with the nature of things. Rescission, and damages for breach of contract, are founded upon opposite principles—the existence of the one, is the annihilation of the other. They are as opposite as life and death—as light and darkness—as rationality and lunacy.

Let me here request the attention of the Court to some of the more prominent admissions of *Newell* and *Beach*, as they appear in the record; and let it be borne in mind, that these very admissions sap the gravamen from the appellees' whole case, leaving it, "like the baseless fabric of a vision," with not a wreck behind.

Both paragraphs in the complaint charge that *Newell* and *Beach* paid *Gatling* 3,000 dollars in cash, as the consideration of each contract. The whole proof shows that these charges are wholly false, as the plaintiffs never paid



one dollar in cash. To say that this might have been amended in the Court below is begging the question. We tried no such case, and if the plaintiffs below had asked for such amendment, defendant would have been entitled to a continuance, at plaintiffs' cost; and, moreover, we deny that such an entire change would have been an amendment. It would have been making a new case.

The statute requires the parties to plead facts. The plaintiffs sue to rescind, and for damages; and aver in their complaint that they paid us 6,000 dollars in cash, and the issues were made up on that averment; and lo! at the trial, the plaintiffs bring a witness on the stand, who swears it was not money that plaintiffs paid defendant, but some real estate, and an old stock of goods, &c., and the witness placed his own value upon them—although the defendant, in his answers, sets up the terms of the contracts, &c. Yet, the plaintiffs file a reply, denying defendant's answer generally. And in this surreptitious manner, the plaintiffs below were permitted to spring the question of proof of the value of an old stock of goods, the mare, buggy, and harness, and the out-lot, without the least notice, in the plaintiffs' pleadings, of any such intention. The proof of value of this property is most outrageously exaggerated. This is called a fair trial. Suppose this Court overlook, for a moment, the evidence in the record, and examine the pleadings, and compare the complaint with the judgment, and who on earth can reconcile the judgment with the complaint, and the facts charged therein, and the relief prayed for. After this view, then, turn to the evidence, and it neither sustains the complaint nor the judgment. The plaintiffs' pleadings on the record are certainly admissions against them, which the defendant has a right to avail himself of, against the pleader.

The plaintiffs aver in their complaint, that they negotiated from *March*, until some time in *July*, 1853. I ask, is this admission consistent with any established rule of law, entitling plaintiffs to a rescission? If it is, where is that established rule to be found? Certainly not in any lawyer's library. They negotiated, treated the contracts as their own, assuming and exercising a controlling negotiating power over, and with the contracts, with the drill territory purchased, from *March* until *July*, 1853, and long after they had pretended to have discovered the overwhelming frauds that, in imagination, had been practiced upon them, and now galvanized into breathing vitality by the ingenuity of counsel; one of which great galvanic frauds was, that "*Michigan* was one of the best wheat-growing states in the *Union*."

See *Beach's* letter, of the date of 12th of *March*, 1853, to *Gatling*. The letter is made a part of *Gatling's* answer, and is made an exhibit. What does *Beach* admit in that letter? Or, rather what does he state? Not the first charge of fraud, in the most remote degree, but he merely asks *Gatling* to take back part of the drill territory, in payment of the two notes which *Gatling* held on *Newell* and *Beach*, being part of the consideration of the sale of the 5th of *February*, 1851. These two notes amounted to something over 700 dollars. *Beach* concludes the letter by these words: "This is our only hope." When *Beach* wrote that letter, he well knew all he ever pretended to know of the pretended fraud, if any ever existed. Why did he not then charge *Gatling* with it? The law required it to be done, and who can show a contradictory authority? Did not the law, then, as well as now, require it of *Newell*

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and *Beach* to give *Gatling* notice of the fraud, and of their intention to rescind? And if the fraud charged in the complaint was true, why did not *Beach* charge *Gatling* with it, then, when the law required him to do it?

\* \* \* \* \*

Exhibit No. 5, in defendant's answer, was an unrevoked power of attorney to *C. F. McWilliams*, to sell the drill territory in the state of *Ohio*. Exhibit No. 8, in defendant's answer, was a letter written by *Beach*, from *Lebanon*, *Boone* county, *Indiana*, to *Gatling*, at *Indianapolis*, soliciting defendant to put his price on *Logan* county, *Ohio*. This letter is dated *January 9, 1851*; and by examining the record, it will be seen by *Peaslee's* testimony, that he and *Beach* had visited *Ohio*, after their purchase of the 20th of *November, 1850*, and prior to the date of this letter; and it also will be seen, by the second paragraph of the complaint, that this same county of *Logan* was part of the purchase by plaintiffs, of the date of 5th of *February, 1851*. Exhibit No. 9, was the *Minturn, Allen & Co.* contract, about which the complaint makes such unrestricted charges of fraudulent representations by defendant. The plaintiffs, on the 17th of *April, 1851*, being then in *Ohio*, and at the shop of *Minturn, Allen & Co.*, in *Champaign* county, had every opportunity of seeing for themselves, and making inquiry of *Minturn, Allen & Co.*, and learning, in the fullest manner, if *Gatling* had made fraudulent representations as to said contract. The plaintiffs, with all this opportunity, then and there accepted the said contract as their own, and indorsed their acceptance thereon, in writing, in these words:

"Having purchased the territory for which the within contract was made, we do hereby agree to conform to the terms.

"*Urbana, April 17, 1851.*

*Newell and Beach."*

This admission was made nearly three months after plaintiffs' last purchase, and nearly six months after the first purchase; and yet the complaint, in both paragraphs, avers that defendant made fraudulent representations to plaintiffs, respecting the terms of this contract, and that plaintiffs were induced to purchase from those false representations; and that plaintiffs never discovered this fraud until after the defendant had left *Indianapolis*, the following summer.

Could any admission be stronger of the falsity of those charges made by plaintiffs in their complaint? These exhibits, pleaded in defendant's answer, must be taken as established admissions of fact in the pleadings; for if they were not true, the plaintiffs ought to have denied them under oath, or replied some legal matter in avoidance, which they did not, and dare not do.

The plaintiffs file another deed, of the date of 13th of *September, 1856*, about three years after the suit was commenced. This is an admission that the first deed was not sufficient; and if it was necessary to make the second deed, then certainly the first deed was not sufficient; and if there was not a sufficient deed tendered before the commencement of the suit, how can plaintiffs sue to rescind—much more, sustain a judgment for rescission? The complaint avers that plaintiffs tendered a deed, reconveying the territory, &c. If it was necessary to aver it in the complaint, (and I aver that the law requires it,) is it not necessary to prove it? The authorities say it is necessary. Does not this second deed, which was brought into Court on the trial, about three years after the suit was brought, admit that plaintiffs had not laid the foundation for rescission before suit brought? Need I cite authorities to



prove this to be the law? If they are required, I refer to Judge *Stuart's* brief, and to my brief, submitted when this case was before the Court on a previous hearing. [9 Ind. R. 584, note.]

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The deposition of *James Kingsley* was taken on behalf of defendant, at *Ann Arbor, Washtenaw county, Michigan*. The witness testifies, amongst other things, as follows, to-wit: "I have resided in the state of *Michigan* about thirty years. I have traveled in many of the *United States*, and of the western states. I have the means of knowing whether *Michigan* is relatively a good wheat-growing state, and I think it is a good wheat-growing state, and one of the best in the *Union*, &c.; and is susceptible of the use of the drill," &c. *Beach* being present, then and there, at the time of taking said deposition, and for the purpose of preventing *Gatling* from taking any more deposition: to prove the existence of facts, as sworn to by said *Kingsley*, then and there made the following admission, in writing, indorsed on the back of said deposition, and which is set out in the record, to-wit: "For the purpose of saving time, and the introduction of further witnesses, I admit that the facts testified to by *James Kingsley* are true. March 20, 1856. [Signed] *Newell* and *Beach*, by *William B. Beach*."

After these deliberate admissions, how can the plaintiffs, or their counsel, aver anything to the contrary?

*William Brower* testifies that *Beach* told him, on his return from *Michigan*, in the spring or summer of 1851, that he (*Beach*) had been offered 1,000 dollars more for the drill territory than he and *Newell* had paid for it. And he also testified that *Beach* said, that he (*Beach*) was not trying to sell, but was leasing out, and would make more money by leasing than by selling.

*Ignatius Brown* testifies, also, to *Beach's* admissions. *Brown* was *Gatling's* agent, and went to *Beach* to demand pay for one of the notes that *Gatling* held on *Newell* and *Beach*. *Beach* told *Brown* to write to *Gatling* to send the other note, and *Newell* and *Beach* would reconvey territory enough to pay the notes; and never intimated nor charged any fraud whatever.

If the law can avail the defendant anything, or bind the plaintiffs by settled legal rules, applicable to the rights of others, then these admissions must settle, forever, this case against the plaintiffs. See 1 Greenl. Ev. §§ 171, 172, 174, on admissions. This point as to the admissions of plaintiffs, was raised when the case was first submitted to this Court, after the final hearing below. But in delivering the opinion of the Court, no reference is made to the plaintiffs' admissions, many of which operate as estoppels. This, I respectfully submit, is one of the strongest points in the case; and, it seems to me, is wholly unanswerable.

The most of these documents, showing the written admissions of plaintiffs, are pleaded by defendant in his answer, and operate as matter of estoppel against the plaintiffs, unless denied by them under oath, which was not done; and, therefore, not being denied under oath, they stand in the record as facts found established, and not to be passed by, nor ignored by any finding of the Court below, inconsistent with those established facts, admitted and pleaded by defendant as estoppels. I deny the right of the Court below, as the pleadings stand, to find any verdict inconsistent with those established facts of admission. See 1 Stark. Ev. part 3, § 9. The Court below had no more power to do so, than to arbitrarily mutilate the record, or to drive the defendant out of the Court house by brute force. The judge who tried this cause below,



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had neither the power nor the right to seize arbitrarily upon these established facts and admissions, and put them into the general seething-pot of his judgment, and then draw off the decoction, and deliver it to us as the grand catholicon of the case. This is the first case of any importance, where this feature of anomalous practice, growing out of the new code, has been entertained with any kind of toleration by the Supreme Court.

There is another material matter appearing in the record, to-wit: *Gatling* alleges in his answer, that the lot in *Lebanon*, received by him from *Newell and Beach*, in part consideration of one of the contracts, was incumbered at the time by a mortgage to *Helverton, Mills and Helverton*, to secure the payment of three notes of 100 dollars each, besides the interest thereon, being *Newell and Beach's* indebtedness; and that *Gatling*, in his contract with *Newell and Beach*, agreed to pay off this indebtedness for them. *Gatling's* answer shows that he did so, long before suit brought, and he makes exhibits of the notes in his answer, which exhibits are numbered 1, 2, and 3; and he also avers in his answer, that *Newell and Beach* have never tendered, nor offered to pay *Gatling* back, the 300 dollars and the interest, nor any part thereof, which *Gatling* thus paid for them in cash. These exhibits and facts are not only not denied, but are admitted. Even if the novel doctrine contended for should ever become the law—that parties may be placed in *statu quo* as to the contract, and not as to the subject-matter of the contract—yet here it plainly appears from the record, showing by these admitted facts as to this part of the case, and which no process of metaphysical reasoning can control or mystify, that this has not been done, either in the one sense or in the other. Excuses have been advanced, why *Newell and Beach* could not place *Gatling* in *statu quo*, as to the time the patent has expired. Can any excuse be offered why they should not have tendered *Gatling* the 300 dollars and the interest, which he paid for them in paying off their mortgage indebtedness, and which *Newell and Beach* induced *Gatling* to do, by their contract with him for the patent right—it was part and parcel of the contract—or any excuse for not accounting for the premiums of the *Minturn, Allen & Co.* sales of drills, &c., and for many other matters, &c.? This point, as to these particular uncontroverted facts in the case, has never been answered, and cannot be satisfactorily answered against *Gatling*, if there is any weight in the settled doctrine on the question of rescission of contracts, contained in the following authorities, to-wit: *Hunt v. Silk*, 5 East, 449; *Jenkins v. Simpson*, 14 Maine R. 364; *Rowley v. Bigelow*, 12 Pick. 307; *Shields v. Potter*, 2 Sandf. 262; *Brainard v. Holsapple*, 4 Iowa R. 485; *Remar v. Nullin*, 3 id. —; *Barickman v. Kuykendall*, 6 Blackf. 21; *Brues v. Hone*, 2 Barb. 586.

What has become of the settled doctrine of placing both parties in *statu quo*, if it is to be frittered away by the novel idea that parties can be placed in *statu quo* as to the contract, and not as to the subject-matter? It never was the law, and never can be the law, without abolishing the settled doctrine of every leading authority, on the question of placing parties in *statu quo*. The doctrine means nothing, if parties can be placed in *statu quo* as to the contract, and not as to the subject-matter. The very meaning of *statu quo* is, to place the parties in the same situation as to the subject-matter, as though the contract had never existed; or, in other words, to place the parties—not one, but both parties—in their original situation as to the subject-matter, by rescinding the contract. The rescinding of the contract, is the mere process for arriving



at the result of placing both parties in *status quo*, as to the subject-matter. The subject-matter is the object to be affected by the process of rescission—rescission is the mere process, to accomplish the result, of placing both parties in *status quo*, as to the subject-matter; and when this result cannot be accomplished, rescission cannot perform its office, and the party must seek his remedy on the contract, in damages for its breach.

If rescission can annul the contract, without placing both parties in *status quo* as to the subject-matter, upon what principle, or rule of law, can the Court adjudicate the remainder of the cause, in assessing damages for its breach? Not in virtue of the contract, for that is rescinded. Then upon what principle? None that is known to the law.

The converse of the proposition will show its absurdity. Who can attach any reality to the idea of a judgment for the specific performance of a contract, that does not operate upon the subject-matter? Such an idea is simply preposterous.

Specific performance of, and rescinding a contract, are correlative remedies—they are merely different processes, operating conversely upon the subject-matter, upon correlative principles.

Contract is the mere predicate of the subject-matter. Rescission, according to established rules of law, must place both parties in *status quo* as to the subject-matter, by adjudging that the predicate—i. e., the contract—does not exist; or, if ever in existence, it exists no longer. *Status quo* operates upon the subject-matter, the tangible substance, which is the object to be affected by the suit, and for which a remedy is sought, to place the parties in their original condition as to that subject-matter. By what process? By rescinding the predicate—the contract; and this must be done as an entirety, or it cannot be done at all—otherwise, the whole remedy sounds in damages for its breach. Assessment of damages for the breach of a contract, is not, and never has been, an adjunct remedy, neither with rescission, nor with specific performance.

The placing of the parties in *status quo* as to the subject-matter, is rescinding the contract; but rescinding the contract without it, is not—the contract is not rescinded without it; otherwise, one, or both parties, may be deprived of rights, without a remedy.

There were three contracts—the first in *September*, 1850, for four counties in *Ohio*, for which *Beach* paid *Gatling* a mare, buggy, and harness, as the sole consideration, and *Gatling* made *Beach* a deed for the territory. *November* 20th, the second purchase was made, by *Newell*, *Beach*, and *Peaslee*, for *Minnesota* and *Michigan* (except three counties), for which *Newell* and *Beach* conveyed to *Gatling* an in-lot and an out-lot in *Lebanon*, *Boone* county, *Indiana*, as their part of the consideration—*Peaslee* paying *Gatling* his third; but the deed was made to *Newell* and *Beach*, at *Peaslee's* request, and the said four counties, of the *September* purchase of *Beach*, were included in the second deed, and *Gatling's* deed to *Beach*, of *September*, was given up. There was a mortgage incumbrance, to secure three promissory notes, on the in-lot in *Lebanon*, at the time *Newell* and *Beach* conveyed it to *Gatling*, amounting to some 300 dollars and interest, being *Newell* and *Beach's* indebtedness to third parties, in no way connected with this business. In this contract, of the 20th of *November*, 1850, *Gatling* was to pay off this mortgage indebtedness of *Newell* and *Beach*, and *Gatling* did so, long before suit was brought. *February*

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5, 1851, *Newell and Beach* made the third contract, for some twenty-four counties in *Ohio*, for which *Newell and Beach* transferred to *Gatling* an old stock of dry-goods, then in a store-room at *Lebanon*, and also executed to *Gatling* their two several promissory notes, for about 374 dollars each, which have never been paid—this was the whole of *Newell and Beach's* consideration to *Gatling*, for the third purchase. In this last purchase, is included the county of *Champaign*, in *Ohio*, where *Minturn, Allen & Co.* resided, at *Urbana*, who had made a contract, some short time previous, for the privilege of manufacturing and selling drills, and were to pay 10 per cent. for the privilege, on the amount of the sales of the drills that they might manufacture and sell. This *Minturn, Allen & Co.* contract had been made on the part of *Gatling*, by an agent of his, by the name of *Pope*. *Newell and Beach* went to *Urbana*, and accepted the *Minturn, Allen & Co.* contract, on the 17th of *April*, 1851, in writing, on the back thereof, and placed themselves in *Gatling's* stead, in this contract with *Minturn, Allen & Co.*, who manufactured and sold a number of the drills, the percentage whereof, coming to *Newell and Beach*, amounted to near 200 dollars. *Beach* went to *Michigan*, in the spring of 1851, and leased out, to divers individuals, the right to manufacture and sell drills for terms of years. *Gatling* had sold the mare, buggy, and harness, and the old stock of store goods, and the out-lot in *Lebanon*, and had paid off the 300 dollars and interest, of *Newell and Beach's* mortgage indebtedness on the in-lot in *Lebanon*, long before this suit was brought. These are facts, appearing in the pleadings and the record, as plainly, and beyond any question, as any facts in the case; and, without enumerating anything further of the overwhelming amount of evidence appearing in the record, these facts ought to satisfy any untrammelled mind. Look, for one moment, at the judgment of the Court below, for the magnificent conceptions of the law, of the great doctrine of rescinding a contract, and placing the parties in *statu quo*. This judgment has been attempted to be sustained, by the idea that it substantially places the parties in *statu quo*. *Gatling* had sold all the property that he received of *Newell and Beach*, long before suit was brought, except the in-lot in *Lebanon*, and had paid off the mortgage debt of *Newell and Beach* on that lot, as before stated; and on the contrary, *Newell and Beach* had accepted the *Minturn, Allen & Co.* contract (and that acceptance was, and still is now, unrevoked) on the 17th of *April*, 1851; and *Minturn, Allen & Co.* had manufactured and sold drills under it, both before and since said acceptance by *Newell and Beach*, and premiums and percentage had accrued to them, of nearly 200 dollars, which they either have received, or were entitled to receive, and have never rendered any account thereof to *Gatling*, in any manner. It may be said, *Gatling* may now go and receive them of *Minturn, Allen & Co.* Is there now any privity of contract between *Minturn, Allen & Co.* and *Gatling*, to entitle him to receive the money? and is not the right to enforce its payment now barred by the statute of limitations? Does it not also appear that *Newell and Beach* leased out the territory in *Michigan*, as already stated, and gave *McWilliams*, in *Ohio*, a general power of attorney to sell territory? And were not all these incumbrances of *Newell and Beach* on the drill territory, outstanding when the suit was commenced, and long before? And the record does not show that the leases in *Michigan* were ever revoked.

To say nothing of other parts of the record, how does the judgment of the Court below proceed? It rescinds the contracts at the first dash, and adjudges



*Gatling* to convey the in-lot in *Lebanon* to *Newell* and *Beach*, clear of all incumbrances. Let me ask, did *Newell* and *Beach* convey it in that manner to *Gatling*? Certainly not; but conveyed it with the mortgage incumbrance, which *Gatling* was to pay, and did pay off for *Newell* and *Beach*, before this suit was brought. The most the Court could do in that matter, if all other things were correct, was to order a reconveyance, with a special warranty against any incumbrance that *Gatling* may have suffered, or any person claiming under him. The Court find farther, that *Gatling* shall pay to *Newell* and *Beach* 2,600 dollars and upwards in damages, and order and adjudge *Gatling* to accept the deed of *Newell* and *Beach*, of the date of September 13, 1856, conveying the right which they then had in the drill territory. This deed was tendered during the term of the Court at which this judgment was rendered, and some three years after suit was brought; and then the Court adjudge *Gatling* to give up the two notes on *Newell* and *Beach*. \* \* \* \*

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The new code of civil procedure has not, in the least, changed the rights of the parties as to the measure, nor as to the principles, of relief to be granted, in cases of this description. How, then, can this judgment of the Court below be sustained, on any recognized principle of law? It is a judgment declaring the contracts rescinded; and in the same judgment the Court assess, in damages, the sum of 2,600 dollars to be paid to the plaintiffs, by the defendant below, for its breach—although plaintiffs never paid any money whatever—and decree the defendant to take back the shreds and fragments of the drill territory. \* \* \* \*

As to the rejected evidence generally, all we need further say, is, that inasmuch as the appellees charged the appellant, in their complaint, with fraud and fraudulent representations, and that the invention was inoperative, and entirely worthless, &c.; and as they sought to establish such material allegations by proof of every shade, was it not right and just, and is it not the settled law, to allow the appellant, under such circumstances, to introduce the broadest testimony to the contrary, to rebut the presumptions raised against him?

No man can read the complaint, and the whole record, without being convinced that the rejected evidence, in whatever aspect the case may be viewed, was material, relevant, and admissible; and that it did have a legitimate and inseparable connection with the material facts sought to be established.

This Court, on a former hearing of the cause, were unanimous in the opinion, that the items of rejected evidence went to a material point in the case, and were material, relevant, and admissible, and that the Court below erred in rejecting said testimony. Such being the case, how can this Court now decide the point to the contrary, and say what weight said rejected evidence would have had upon the minds of the jury, had the same been submitted to a jury? Can it be said, such evidence would not have benefitted the appellant, had it been admitted, as this Court, on a former hearing, have unanimously decided it should have been at the hearing in the Court below?

\* \* \* \*

The doctrine of the law is, that where fraud is charged as the foundation of a suit, the greatest latitude is observed in the admission of testimony to rebut such charges. This is the general rule. The reason of the rule is sound. The evidence excluded by the Court below was facts, and does not come within the rule of *res inter alios acta*. "It [evidence] is admissible, if it tends to prove the issue, or constitutes a link in the chain of proof; although alone, it



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might not justify a verdict in accordance with it. Nor is it necessary that its relevancy should appear at the time when it is offered." 1 Greenl. Ev. § 51, and authorities cited.—*McAllister's case*, 11 Shepl. 139.—*Haughey v. Strickler*, 2 Watts and Serg. 411.—*Jones v. Vanzandt*, 2 McLean, 596.—*Lake v. Munford*, 4 Sm. and Marsh. 313.—*Belden v. Lamb*, 17 Conn. R. 441.—*McLush v. Collier*, 15 Ad. and El. 373, N. S.

If we cannot rebut the presumption of fraud, how can they charge us with it? The excluded evidence was relevant to this issue, and the disputed facts as to the value of the drill as an implement, &c.

"The great and general rule upon the subject seems to be this—that all facts and circumstances, upon which any reasonable presumption or inference can be founded, as to the truth or falsity of the issue, or disputed facts, are admissible in evidence." 1 Stark. Ev., part i. § 7.

(2) Mr. Judah, for the appellees, submitted the following argument:

Contrary to the determination of this Court heretofore, only to hear an argument on "the points specifically made in the petition, or as to some one or more of them," the counsel for *Gatling* have been pleased to submit a brief of thirty-nine pages, of which twenty-eight pages contain discussions of other points entirely. In our copy of this brief, with the greatest respect both for the wit and the learning of the counsel, we have taken the liberty to stitch up these twenty-eight pages, and we respectfully submit to this Court the propriety of directing the sheriff to perform the same operation on the copies furnished the Court.

We understand that the only question now open, is that stated by this Court on page 584, 9 Ind. R., of the "evidence touching the *Illinois* sales."

It is the law of this state that "the Court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect." 2 R. S. p. 50, § 101.

The contracts were made in 1850. The action was commenced in 1853. The trial was had in 1856.

The gravamen of the complaint is found in certain alleged false and fraudulent representations. These representations, then, form the substance of the rights of the parties, so far as the evidence is concerned.

Were they made? Were they material? Were they, at the time they were made, or at the time to which they referred, true or false?

That they were made, is found by the Court. But the proof is on the record; and, by way of refreshment, it may be well to refer to the items.

Judge Peaslee states four representations—

1. Thirty-two drills had been sold at *Urbana*.

This was false, as appears by *Wilson's* and *Nelson's* testimony.

2. *Mayhew's* contract to manufacture one thousand drills that year at *Chicago*.

There is no pretense of the truth of this.

3. Premiums of 8 dollars per drill in *Ohio*, 10 dollars in *Illinois*. False. No proof of any in *Illinois*, and only 10 per cent. in *Ohio*.

4. Drills to be obtained at *Chicago*.

Utterly false. No pretense of proof; and to the contrary, see *Evans's* testimony.



The testimony of *James McWorkman* is very fall. He states the time of the conversation, *November, 1850*, and we select, as the counsel for *Gatling* says he selected from "our own Reports, at random."

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1. Territory in demand.
2. Letters almost daily.
3. One thousand drills manufactured at *Chicago*.
4. Ten dollars premium at *Chicago* on the one thousand drills.
5. Thirty drills already sold at *Urbana*.
6. Ten dollars premium again.
7. Drills to be had at *Chicago*.
8. *Minturn, Allen & Co.* intended to give up all other business.
9. Could not supply the demand in *Ohio* the last season.

In relation to these false statements, in number nine, on their face each material and within the peculiar knowledge of *Gatling*, and each relating to the state of the business in 1850, there is no evidence or even pretense of the truth of any, and the last seven are each contradicted by the testimony of *Mayhew, Nelson, Minturn, and Evans*.

It cannot be pretended that this evidence does not make out facts proper to sustain a judgment for rescission, if the other requisites for such judgment are shown to exist. Those other requisites are shown to exist by the case, as heretofore determined.

But it is said that the complaint, in addition to a prayer for rescission, also prays damages as for the breach of an existing contract. But "no judgment shall ever be reversed" for the misjoinder of causes of action. 2 R. S. p. 38, § 52.

By our law, "The Court may, at any time, in its discretion," direct "any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved; when the amendment does not substantially change the claim or defense." 2 R. S. p. 48, § 99.

Hence, we say, that after it appeared by the evidence, that the facts required a claim for rescission, the Circuit Court should have struck out the claim for damages. Such is not only the language of this statute, but it is the undoubted policy of the whole system. And so, again, no judgment can be reversed "for any defect in form, variance, or imperfection," in the pleadings, &c., which might by law be amended in the Court below, "but such defect shall be deemed to be amended in the Supreme Court." 2 R. S. p. 162, § 580.

Hence, if the Circuit Court could or should have struck out the claim for damages, so as to make the complaint conform to the evidence, this Court will deem it so done. But, again, no judgment shall be reversed, if it appear that the merits of the case have been fairly tried in the Court below. 2 R. S. p. 162, § 580.

We refer to this last provision for the purpose of submitting to this Court that, in such case, this Court must examine the record and determine for itself, whether the merits have been fairly tried.

It has been ruled by this Court, that a party cannot complain of the rejection of testimony, "unless the record show that he was injured." *Let v. Horner*, 5 Blackf. 296. We translate this to mean, that this Court must be satisfied, by the record, that the party was injured.

Hence, the question in such case is for this Court, not whether the rejected evidence might have changed the result, but first, whether, according to the



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law of the land, if admitted, it should change the result. If this Court determine that such should be the result, then will come the second question, but for the jury, and not for this Court, under any circumstances—Shall it change the result? Respectfully we object to the language of the Court, in the statement of the question. 9 Ind. R. 584. It is sufficient to reverse the case, "unless we can say that that evidence if admitted, would not have changed the result."

The Court have not examined, as we read the case, the previous question—Should that evidence, if admitted according to law, change the result. In other words, does it touch the merits of the case? What are the merits? They are found in nine several distinct, false and fraudulent representations. These are sufficient to sustain the judgment. With neither of them have the rejected evidence any, the least, connection.

But there was a tenth representation in evidence, that the improvement was valuable. Valuable in 1850? The rejected evidence tended to show some value in 1856. Possibly its admission would not have been error. Possibly, if admitted, it might, not should, have had some weight as to the determination of the jury on this tenth representation. But how could or would it, or rather how should it, affect the determination upon the other nine facts with which it had no connection, and which of themselves are sufficient to sustain the judgment?

We have referred to the various statutes above for the purpose of showing the policy of our law, and so, the reasonableness of our position, that whether the rejection of evidence was proper or not, the judgment cannot be reversed.

We wish to submit a few remarks as to the evidence itself. We deny that this evidence was admissible. It was as to a fact which occurred six years after the contract was made, three years after the suit was instituted, and between strangers. It no more went to show value in 1850, in the patent, than the admitted facts, that *Beach* bought and paid for it in 1850; or that eighteen or twenty drills were sold at *Urbana* in 1851 and 1852. It only went to show that as *Beach* was found to be gulled in 1850, and the eighteen *Ohio* men were found to be gulled in 1851 and 1852; a man was found in *Illinois* to be gulled in 1856. *Beach* repudiates. The *Ohio* purchasers returned their drills; and for all that appears, the *Illinois* purchaser would do the same at the proper time, unless, indeed, the whole thing was collusive. And we refer to 1 Stark. Ev. pp. 58, 59; 8 Cush. 600; 17 Ohio R. 16; 2 Greenl. Ev. § 494.

Messrs. *Willson*, *McDonald*, and *O'Neal*, submitted the following argument:

Under the rulings of the Court, this cause is re-submitted upon the exceptions taken to the rulings of the Circuit Court, as contained in the fourth and fifth bills of exceptions. These exceptions show that during the progress of the trial, the appellant offered to prove by a witness by the name of *Hart*, that recently he, *Hart*, had sold, as agent for *Royal Mayhew*, territorial rights in the state of *Illinois* for a large sum of money, and that there was, at that time, a great demand for the drill in the state of *Illinois*; and the appellant also offered to prove generally, by said *Hart*, that sales for territorial rights, had been made in the state of *Illinois*, and what demand existed there for the drills. The Court, on the objection of the appellees, refused to hear said evidence, but permitted the appellant to prove what sales, if any, had been made, of terri-



torial rights in the state of *Illinois*, and what demand existed there for the drill up to the time of the making of the contracts in controversy in the suit, and for and during the ensuing season.

These rulings, by proper bills of exceptions, are brought before the Supreme Court, to test their correctness.

It is claimed that the evidence was pertinent to the issues, and legitimate, as tending to prove that the territorial rights sold by appellant to the appellees, were of some value; and it is further claimed that in determining the question of the rescission of the contracts between the parties, the value of those rights, was a matter material for the consideration of the Court. We controvert both of these propositions, and shall discuss them in the reverse order in which they are here stated.

We contend that the question of value of the rights, did not legitimately enter into the question of rescission.

If the Circuit Court had determined that the contract could not be rescinded, but that the appellees were entitled to damages, on account of the fraud perpetrated, then the question of the value of the rights would have been material, in order to grant the proper measure of relief. But to entitle the appellees to rescission, it was not necessary to allege that the rights were of no value; and the allegation was only intended to enable the appellees to fix their measure of damages in the event that the relief by rescission should be denied them; and inasmuch as rescission was the main object of the complaint, and the principal relief sought, other and minor questions of relief could not be deemed material, until this had been overruled. At all events, this Court cannot reverse this case on account of the rejection of evidence, which could only be material in the event that a different relief had been granted by the Circuit Court.

It is laid down as a general proposition in cases of this kind (and we admit its correctness), that the application to a Court for the rescission of a contract, is addressed to the sound discretion of the Court, under all the circumstances of the case. That is, all the circumstances that enter into the questions upon which the right of rescission depends, and these questions, in our opinion, are two—

*First.* Fraud in the contract, such as would vitiate and render it void.

*Second.* That the party defrauded, had, with legal diligence tendered a rescission, by offering back what he had received, and demanding what he had given on the contract.

If these two points are sufficiently established we conceive that the defrauded party is as much entitled to this kind of relief, as he would be to have judgment on a promissory note, where no successful defense had been made. Nor is he bound to keep a specific article, that had been put upon him by a fraud, because it may be said to be valuable or equal in value to the price paid.

If, for instance, *A.* should purchase of *B.* a dwelling, under representations from *B.* falsely and fraudulently made, that it was well situated, and free from noise and disturbance, and upon taking his family to it, should find it surrounded by shops and stores, and subject to constant din, and wholly unfit for a residence, and should, with proper diligence, tender a rescission, could *B.* defeat his right to rescind by setting up that the property was worth more than *A.* had given for it? We think not. But if *A.* should fail to obtain a rescission of the contract, then the question of value would be material. But in reviewing a decree for the rescission of the contract, would this Court reverse

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it, because the Circuit Court had not listened to the evidence of value, which could only be material, if the particular relief granted had been denied by the Circuit Court.

But even if the question of value was involved in determining the right to rescind, we are quite clear that the evidence was correctly rejected.

*First.* It falls within that class of evidence which is denominated *res inter alios acta*, in reference to which the following rule is laid down by *Starkie*: "Great latitude is justly allowed by the law in the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. The law interferes to exclude all evidence which falls within the description of *res inter alios acta*. The effect of which is, to prevent a litigant party from being concluded or even affected by the evidence, acts, conduct, or declarations of strangers." 1 *Stark. Ev. p. 58.* Again, on page 59, in giving the reason of the rule—"For it may have been made, not because the fact admitted was true, but from motives, and under circumstances, entirely collateral, or even collusively, and for the very purpose of being offered as evidence." This rule is adhered to by all elementary writers on the law of evidence, and is so just that it cannot safely be departed from; and we think it wholly excludes the testimony offered. It was clearly the result of acts of strangers, and that, too, long after the contracts involved in this case had been made, and while the litigation was in progress to determine them. It was obnoxious all over to the suspicion of collusion. The Circuit Court judged it with all the lights before that Court, and rejected it. We think this Court cannot reverse that decision on that ground.

In the second place, the circumstances offered to be proved had no legitimate connection with the facts sought to be established. The appellees had alleged that the property sold to them was of no value. That is, that the right to make and vend the appellant's grain drill in certain specified territory, in the states of *Ohio* and *Michigan* and *Minnesota*, was of no value. And it is attempted to prove what the right in these territories is worth, by showing the demand for the drill in the state of *Illinois*, and sales made of the right in the last-named state; and this, too, five years after the purchase made by *Newell* and *Beach*. This appears to us too far-fetched; it is like proving the value of real estate in *Indiana*, by showing what real estate is worth in *Illinois*. But it may be contended that the general topography of the country is known to the Court, and that there is no such dissimilarity between the two sections of the country, but that an implement of this kind must have some value in the one, if it sells readily in the other, and that this establishes a sufficient connection to make the testimony pertinent and legitimate. We do not see the correctness of the analogy. Mere adaptation of soil is not the only thing necessary to give demand and value to such a right. Popular favor is the most important element in creating such value, and the Court cannot judicially know anything about the relative situation of the two sections in this particular.

The Court has as much knowledge judicially of the topography of *Texas* as of *Illinois*, and may be as well assured of the adaptation of the soil in this first-named state to the use of the drill as of the adaptation of that of *Illinois*; and yet we do not think the Court would hesitate to reject evidence of sales and demand in the state of *Texas*. If it was competent for the appellant to prove value by such evidence, then it would have been competent for the ap-



pelles to rebut it by the same kind of evidence. That is, to prove that in other states and territories, the right had no value, and that there was no demand. But this is so completely outside of the issue, that a mere statement of it is sufficient to repel it.

But again, we do not think that offers to buy, or offers to sell, or sales themselves, even if limited to the territory in question, would be proper evidence to determine the value. Such have been the rulings in regard to other kinds of property, and we do not see why it is not applicable to this. See 8 Cush. 600; 17 Ohio R. 16. And it is on the ground that such testimony is liable to collusion and fraud. In 17 Ohio R. 16, the Court holds the following specific language:

"The Court permitted proof of the amount for which the property of *Myers* sold under the assignment, to prove the value of the property of *Myers* at the date of the declaration in the letter complained of. This is wrong. The true question is, what was the value of the property; not, what did it sell for. Property often sells for less than its value, and almost certainly so, at forced sales. What the property sold for under such circumstances, would not be evidence to prove its value at a fair time."

It is insisted, however, that a distinction exists in regard to this species of property, and *Curtis on Patents*, p. 469, and 2 *Greenl. Ev.* § 494, are cited to show that distinction. Both of these authors are discussing the question of utility, as affecting the right of the patentee to claim a special property in the thing patented.

To entitle him to maintain his claim, he must show his invention to be both new and useful. As to the question of novelty, the letters patent are *prima facie* evidence, but he must give some evidence of the utility. This may be done, say the authors, by the testimony of persons well conversant with the subject, that the public had given large orders for the article, or that licenses had been taken for the exercise of the right. That is, the utility of the implement patented, may be so shown; and this authority can only apply where the right of the patentee to the thing patented, or to property in it, is in controversy. That is not the case in this suit. It is not questioned that the appellant was the patentee. Indeed, it is so averred in the complaint. Nor is it urged that he had no property in it, but that the territory he had sold to the appellees, was of no value. But then, again, these authorities, if they applied to proof of value (which they do not), fall short of establishing the points; for they do not state that when the question of value as to a particular territory is involved, you may show orders or licences in another, to prove that value. It is only when the question involved is utility, or utility in general, that the evidence is applicable for the purpose of proving utility. But even then, it does not prove any value. The proof of utility is inferential only from the evidence. But can you go further, and draw an inference from an inference? As, for example, from the fact that licenses have been taken out for the exercise of the right, and orders given by the public, the jury may infer that the implement patented is of utility, and having drawn that inference from the evidence, may they further infer from its utility, that it is of some value, and farther, because it is of utility in *Illinois*, it is of utility in *Ohio* or *Michigan*; and because they have inferred from the demand in *Illinois* that it is of utility there, and of some value, they might also infer that it was of utility and value in *Ohio* and *Michigan*? Surely, this is extending the doctrine of inferential and presumptive

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evidence to the very verge of judicial discretion, and we cannot believe that the Court is prepared to depart from the plain principles laid down by our text writers, to follow it to this length. \* \* \*

Let us suppose for the argument, that the testimony of *Hart* was erroneously excluded; does it necessarily follow for that reason, that this case must be reversed? Not at all. It is a well established practice in all Courts for the correction of errors, and has been for ages, that where the Court below committed an error which could not have operated to produce a different judgment, and which worked no injury to the party against whom judgment was rendered, they would not reverse for that reason. A familiar instance is to be found under the old practice. Where a defendant filed the general issue, and a valid special plea, and a demurrer was sustained to the special plea, and final judgment rendered for the plaintiff, it was found by the Court of error that all the evidence that could have been given under the special plea could also have been given under the general issue, and they refused to reverse. This practice was, and is, universal. The law, unlike many men, abhors useless litigation.

Applying this principle to the case before us, how does it stand? The testimony of *Hart* would have been entirely immaterial as to the question of rescission. That question depended solely upon the inquiry whether *Galling* induced *Newell* and *Beach* to purchase by false and fraudulent representations. If *Hart's* testimony was admissible at all, it was so only as to the question of damages. But the Court did not find damages. On the contrary, considering all proper testimony on that point, it rescinded the contract. And as the rejected testimony was wholly inapplicable to that issue, how could *Galling* have suffered by the rejection, or the result have been changed? We, therefore, conclude, that there is no rule of law by which this case can be reversed for the reason under consideration.

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### HOLLAND and Others v. MOODY.

Where a *feme sole*, being the payee of a promissory note, married prior to the statute of 1853 (Acts, p. 57), held, that the husband acquired a property in the note, and he, alone, could pass it by indorsement; and he could sue upon it without joining his wife.

The husband's right to the note, in such case, vested at the time of the enactment of the statute, was not affected thereby.

Thursday,  
May 26.

APPEAL from the *Franklin* Court of Common Pleas.  
WORDEN, J.—Action by the appellee against the appellants.

The complaint avers, in substance, that on the 12th of August, 1852, *William McCleary* (since deceased), together



with *John C. Burton* and *Andrew R. McCleary*, executed to the plaintiff, by her maiden name of *Hannah A. Lefforge*, a promissory note for 800 dollars, payable four years from date; that on the 11th of *December*, 1852, the plaintiff was lawfully married to one *John W. Moody*, and that during the coverture, to-wit, in the year 1855, at the county of *Franklin*, in the state of *Indiana*, he, said *John W.*, fraudulently obtained possession of the note, under the pretense of depositing it for safe keeping with his father, *John B. Moody*, of *Cincinnati, Ohio*, and that said *John W.*, thus having the possession of the note, assigned it to the said *John B.*, without the knowledge, permission, or consent of the plaintiff; that said *John B.* indorsed the note to *Louis, Stix & Co.*, and that *Louis, Stix & Co.* indorsed it to *George Holland*; that on the 18th of *August*, 1856, *Holland* brought suit upon the note against the makers in the *Franklin* Court of Common Pleas, alleging, amongst other things, in his complaint, that the plaintiff herein had joined with her said husband, *John W. Moody*, in assigning and indorsing the note to *John B. Moody*, which allegation, it is alleged, is wholly untrue—that said plaintiff never did by herself indorse or assign the note, nor give authority or permission for any other person to do so; that at the *October* term, 1856, of the *Franklin* Court of Common Pleas, *Holland* recovered judgment on the note against the surviving makers; that the plaintiff was not aware of the pendency of the cause, nor was she aware that the note had been transferred and put in circulation, until the latter part of the summer of 1856; that immediately upon receiving such information, she notified *Andrew R. McCleary*, one of the makers, that the indorsement thereon, purporting to be hers, was fraudulent, and that she had never parted with her property in the note; that the plaintiff was surprised at the suit on the note, but not being made a party to it, and having given one of the makers notice as aforesaid, she did not deem it incumbent on her to take further notice of the fraudulent transfer and indorsement of the note; that replevin bail has been entered

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Prayer for an injunction, &c., and that the proceeds be paid to the plaintiff.

The defendants filed a demurrer to this complaint, assigning for cause that it did not contain facts sufficient to constitute a cause of action. The demurrer was overruled by the Court, to which ruling the defendants excepted. The defendants then answered, and such further proceedings were had as that final judgment was rendered for the plaintiff below.

The defendants appeal to this Court, and assign for error the ruling of the Court below on the demurrer to the complaint.

There is one point which we think is fatal to the complaint. The plaintiff, according to the averments in the complaint, and *John W. Moody*, were married on the 11th of *December*, 1852, the note in question having been given before that time. By virtue of such marriage, the husband acquired a property in the note, and he, alone, and not his wife, could negotiate and pass it by indorsement. He could also sue upon it without joining his wife. *Evans v. Secrest*, 3 Ind. R. 545.—*Mc Carty v. Mewhinney*, 8 *id.* 514. After this, the legislature passed an act providing that "the personal property of the wife, held by her at the time of her marriage, or acquired during coverture by descent, devise, or gift, shall remain her own property, to the same extent, and under the same rules, as her real estate so remains; and on the death of the husband before the wife, such personal property shall go to the wife, and on the death of the wife before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances." Acts of 1853, p. 57, § 5.

When this act passed and took effect, *John W. Moody* had such a vested right in the note, as could not be destroyed by legislative enactment. This proposition is fully settled by the case of *Westervelt v. Gregg*, 2 Kern. 202.



In that case, the controversy was in reference to a legacy left to the wife. **DENIO, J.**, says:

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"That the right which the respondent had to this legacy, the instant before the act of 1848 took effect, was property, in the justest sense of that term, I cannot doubt. An immediate right of action for the recovery of money, which, when recovered, is to belong to the party in whom the right of action exists, subject to be defeated only by the contingency, that a person in being may die before judgment can be obtained, is a valuable pecuniary interest, which deserves protection equally with rights which are absolute and unconditional. Besides, this was an interest which the respondent might sell, and for which he might receive the consideration to his own use. This property the act, if valid, has deprived him of. It declares it shall no longer belong to him, but shall be the property of his wife as though she were a single female."

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This reasoning establishes the proposition that although the note in the case at bar had not been transferred by the husband at the time the act in question took effect, yet he had such a right in it as could not be divested, and that his subsequent transfer was valid. The case in *New York The Junction Railroad Co. v. Harris*, 9 Ind. R. 184.

It follows that *John W. Moody* had the legal right to transfer the note so as to vest the title in his assignee. The fact that it was averred in the complaint in the suit by *Holland* against the makers, that the plaintiff joined in the assignment of the note, is wholly immaterial. That allegation might have been stricken out as surplusage, *John W.* having the right to make such assignment alone without the plaintiff. *Evans v. Secrest, supra.*

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, with instructions to the Court below to sustain the demurrer to the complaint.

*G. Holland* and *C. C. Brinkley*, for the appellants.

*D. D. Jones* and *H. Berry, jun.*, for the appellee.



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PRENATT v. RUNYON.

Where the items of an account are all on one side—there being none on the other side except credits of payment—the account is not mutual, open, and current, within the meaning of the statute of limitations.

To take a case out of the statute of limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought; and the amount of that debt must be shown to be greater than the sum paid.

Order in writing as follows: "*Vernon, July 14, 1850. Mr. F. Prenatt—Sir: I want you to send me two barrels of whisky, as soon as possible, and I will be down this week and pay you for the same,*" &c. "*Yours, Israel Runyon.*" *Held*, that the six years' limitation does not bar the order.

It is not necessary that such an order should mention the price of the articles ordered, and stipulate to pay for them. The contract amounts to an agreement to pay what the articles are reasonably worth; and where such an order is accepted and the goods sent, the person ordering them will be liable to pay for them, though he may not actually receive them.

If the complaint be upon a verbal contract, and the answer set up the statute of limitations, and the reply set up a written contract not within the statute, this, *it seems*, would be a departure; but if the parties go to trial upon such replication without objection, the defect is waived.

The reply, in this case, set up, 1. That the cause of action did accrue within six years, as it is brought upon a running, open, and unsettled account, some of the items of which are within the six years. 2. That a portion of the goods were sold upon written orders (similar to that above set out).

*Held*, That, waiving the objection of departure, the reply was good, in avoidance, so far as it went; that the plaintiff had a right to set up matter which would take a part of his cause of action out of the statute; that if a reply purport to avoid the answer entirely, while one branch of it avoids it in part only, the defect must be objected to in the Court below; that objection to the duplicity of the reply should also have been taken below—else it is waived, and the whole pleading will be deemed to be controverted.

Thursday,  
May 26.

APPEAL from the *Vigo* Court of Common Pleas.

WORDEN, J.—Action by the appellant against the appellee, on an account for goods sold and delivered.

The defendant answered—

1. By general denial.
2. That the cause of action did not accrue within six years next before the commencement of the suit.
3. Payment.

To the second paragraph of the answer the plaintiff replied as follows, viz.:



"That the cause of action did not accrue within six years before the commencement of this action, for that some of the items on either side, as set forth in the plaintiff's bill of particulars, are within six years before the commencement of this suit. The plaintiff says that this action is brought to recover money due and payable upon a running, open, and unsettled account of merchandise between the parties as merchants. That the following items of said account were sold and delivered by the plaintiff to the defendant, upon orders in writing executed by the defendant, viz.: [Here follow sundry dates of orders and amounts, making 106 dollars, 76 cents,] which said orders are filed in this cause with the plaintiff's answer to interrogatories, and referred to."

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Issue was taken on the answer of payment, and a trial was had by the Court, resulting in a finding for the plaintiff for 201 dollars, the amount of his claim. On motion of defendant, the finding was set aside and a new trial granted. Plaintiff excepted. The cause was again tried, by a jury, and a verdict returned for the plaintiff for 21 dollars, 92 cents. Plaintiff moved for a new trial, but his motion was overruled and judgment entered on the verdict.

The ruling of the Court, in setting aside its finding and granting a new trial, is, among other things, assigned for error; but as this point is not noticed in appellants brief, it will be deemed waived.

The reasons filed by the plaintiff for a new trial are, that the verdict is contrary to the law and the evidence; and alleged error of the Court in giving and withholding instructions.

The plaintiff's account, sued on, consists of various items of merchandise, groceries, and liquors, commencing *May 15, 1850*, and ending *January 4, 1851*. The suit was commenced *December 22, 1856*. Two items of the account, only, accrued after the 22d of *December, 1850*. These items consist of four barrels of whisky, amounting, with drayage, to 41 dollars, 92 cents. The entire account



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amounts to 386 dollars, from which is deducted the amount of sundry credits given, leaving a balance of 201 dollars.

The plaintiff proved a good portion of his account, and his testimony had a strong tendency to prove the whole of it. No payments were proven subsequent to *December 22, 1850*. One witness, however, testifies that he has seen a receipt, dated in the latter part of *December, 1850*, and after the 22d, from the plaintiff to the defendant, for between 20 and 25 dollars (which has been lost or mislaid by the defendant). This, as the witness thinks, was not an account, but a receipted bill.

The plaintiff gave in evidence five several orders, the first one of which will serve as a sample of the whole, as follows, viz.:

*"Vernon, July 14, 1850.*

"Mr. *F. Prenatt*, Sir: I want you to send me two barrels of whisky as soon as possible, and I will be down this week and pay you for the same. By so doing you will much oblige,  
Yours,

[Signed] *Israel Runyon.*"

The orders were all for whisky (amounting to eleven barrels), and some other articles, and all contained a promise to "be down and pay."

It is apparent that the jury excluded all of the account prior to *December 22, 1850*, as the verdict is for the amount subsequent to that time, less the lowest sum mentioned by the witness, as the amount of the receipted bill.

Error is assigned upon several rulings of the Court in giving and withholding instructions, but we have not examined them carefully (excepting such as will be noticed hereafter), for the reason that we think the verdict right, and in consonance with the law and the evidence, unless the plaintiff was entitled to recover for the goods sold upon the written orders.

The statute provides "that in an action brought to recover a balance due upon a mutual, open, and current account between the parties, the cause of action shall be deemed to have accrued from the date of the last item proved in the account on either side."



It is insisted that, as the last item proven was within the period limited, the statute only run from that date, and, therefore, none of the account was barred.

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The items of the account were all on one side, there being none on the other except credits of payment. We think the terms "mutual, open, and current account," mean something more than charges on one side, and credits of payment on the other. In the language of an elementary writer, "mutual accounts are made up of matters of set-off. There must be a mutual credit, founded on a subsisting debt, on the one side, or an express or implied agreement for a set-off of mutual debts. \* \* \* There must be a mutual, or as it has been expressed, an alternate course of dealing. Where payments on account are made by one party, for which credit is given by the other, it is an account without reciprocity, and only upon one side." Ang. on Limit., 3d ed., § 149. Again, at § 148, "The rule, that items within six years draw after them other items beyond that period, is, by all the cases strictly confined to mutual accounts, or accounts between two parties, which show a reciprocity of dealing. Or, in other words, if the items in the account are all on one side, as between a tradesman and his customer, and there be some items within the six years, but the others are beyond that period, the former will not entitle the plaintiff to give evidence of the latter." *Vide*, also, *Brackenridge v. Baltzell*, 1 Ind. R. 333.

There being no mutuality in the account between the parties, the statute cuts off so much as accrued more than six years before the commencement of the suit, unless otherwise taken out of its operation.

A question is raised by the instructions, and argued by counsel, as to the effect of part payment of the account within the six years. The evidence, we think, totally fails to show any such payment as would take the case out of the statute, and, therefore, it is needless to inquire whether the instructions were correct. The only evidence on that point is the testimony of the witness who saw a "receipted bill" in the possession of the defendant. This "receipted



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bill" would probably be evidence that the goods specified in the receipt were paid for. But it would prove nothing as to the other and prior articles in the account.

The statute having provided that new promises, to take a case out of the statute, must be in writing, enacts that nothing in the preceding section shall take away or lessen the effect of any payment made by any person. 2 R. S. p. 78, §§ 220, 223.

Under similar statutory provisions (9 Geo. 4, ch. 14), it has been held in *England*, that a part payment of a debt would not take a case out of the statute, unless there was also a promise in writing to pay the remainder. Ang. on Limit., 3d ed., note to § 240. We do not, however, feel called upon to decide in this case, whether such should be the construction of our own statute. But in the following propositions, laid down in *Lippets v. Heane*, 1 C. M. and R. 252 (*vide* note above cited), we fully concur, and think they are decisive of the question under consideration in the case at bar:

"In order to take a case out of the statute of limitations by a part payment, it must appear, in the first place, that the payment was made on account of the debt. Secondly it must appear that it was made on account of the debt for which the action is brought. But the case must go further; for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt."

Tested by these principles, it is very evident that the testimony fell far short of proving such a payment as would take the case out of the statute.

At the proper time the plaintiff asked the following instruction, viz.:

"If the jury believe from the evidence, that any part of the account sued on was for personal property sold and delivered by the plaintiff to the defendant on orders in writing,



executed by the defendant, and said orders contain a promise to pay for such part of said account so sold and delivered, so much of the account sold on said orders, is not barred by the statute of limitations."

This was refused as asked, but given with the addition—"If sold and delivered within six years."

The defendant asked, and the Court gave, the following, viz.:

"Under the issues in this case, the plaintiff cannot offer evidence of a written contract for the sale of goods, which would require a longer period than six years to bar the action, and the written orders offered in evidence in this case, can have no other effect than to show a verbal sale of the goods ordered. In other words, the orders in this case are not to be considered as a contract in writing for the purchase and sale of goods."

Plaintiff excepted to these rulings.

Two questions are presented by these instructions, viz.:

1. Were the orders sufficient contracts in writing, not barred by the statute; and,
2. Under the pleadings, could the plaintiff avail himself of them as such?

We are of opinion that the orders mentioned are sufficient contracts; and being in writing, the six-years limitation does not apply to them. They all specify the articles to be furnished, and stipulate to pay for the same. The price, it is true, is not mentioned, nor is it necessary that it should be, in order to make the contracts valid. The contracts amount to agreements to pay what the articles are reasonably worth. There can be no doubt, we think, that had the goods been sent, as contemplated by the orders, by the plaintiff to the defendant, he would have been liable on the contracts, although he might never have actually received them. When the plaintiff accepted the orders, and sent the goods in compliance therewith, the contracts became obligatory upon the defendant, and he was bound for the reasonable value of the goods so ordered and sent. In *Neighbors v. Simmons*, 2 Blackf. 75, it was held that a written acknowledgment at the foot of an account,

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as follows: "I acknowledge the above account to be just," and signed by the defendant, was a contract in writing; and that the plea of the statute of limitations was inadmissible. It is not necessary, however, in determining that the contracts in the case at bar are valid contracts, that we should indorse fully the doctrine in *Neighbors v. Simmons*.

There, there was no agreement to pay the account whatever, except such, if any, as might be implied from an admission that the account was just. Perhaps it may be questioned whether, under our present statute, requiring new promises to be in writing in order to avoid the limitation, such an acknowledgment would be sufficient; but upon this point it is unnecessary for us to express an opinion. The orders in question are original contracts, explicit in their terms, and come within the principle established in *Spangler v. McDaniel*, 3 Ind. R. 275.

In Browne on the Statute of Frauds, § 293, it is said that, "it is not necessary that the contract should be particularly formal or explicit, so that there appear to be a bargain made; a common order given to the seller for the article required, is clearly equivalent to a contract for the purchase." *Vide, Allen v. Bennet*, 3 Taunt. 169.

The other question raised is not entirely free from difficulty.

The complaint simply counts upon an indebtedness arising upon the account, without noticing the orders. In this respect the case differs from *Neighbors v. Simmons*, and *Spangler v. McDaniel*, *supra*, where the original indebtedness, as well as the new written contract, were set up in the declaration.

It is contended by the appellee, that the replication does not sufficiently set up the orders, and rely upon them as an avoidance of the statute, and that if it did, it would be a fatal departure from the complaint, which counts upon a verbal contract merely, while the replication places the cause of action upon written contracts. It is the established doctrine in *England*, and some of the states of the *Union*, that where the plaintiff relies upon a new promise to take the case out of the statute, he may declare upon



the original debt, and reply the new promise. "When the statute is pleaded, the plaintiff may, therefore, reply the new promise, and when the pleadings assume this shape, the original promise is apparently the cause of action; but it is the new promise alone that gives it vitality, and that, substantially, is the cause of action." Ang. on Limit., § 288, and notes.

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In *New York*, it is held, since the code, as well as before, that a new promise may be given in evidence to take the case out of the statute, on a count upon the original cause of action, and a general replication that the cause did accrue within six years, without alleging the new promise. *Esselstyn v. Weeks*, 2 Kern. 635. The Court seem to have somewhat reluctantly come to such conclusion; and they throw out some observations tending to a different doctrine, which are not unworthy of notice. They say, "The rule was established in conformity with the earlier *English* decisions, which made the statute of limitations presumptive evidence of payment only, to be rebutted by any evidence tending to disprove that fact, whether accompanied by a promise or a refusal to pay. In their view of the law, the facts necessary to avoid the bar of the statute were mere evidence for that purpose, and the recovery must be had upon the original promise as the only cause of action. Modern decisions, particularly in this country, regard the statute as imposing an absolute bar to the original demand, and not merely as creating a presumption of payment. And it would, undoubtedly, be more in conformity with the spirit of these adjudications, to hold that the action must be founded upon the new promise, the original debt or assumpsit furnishing the consideration necessary to uphold it."

The case at bar, however, differs from the foregoing—here, the plaintiff does not rely upon a new promise, to take the case out of the statute, but an original promise in writing, never within the statute. Written contracts are not properly within any of the exceptions of the statute, (and, therefore, proper to be shown by way of replication,) as they are not within the limiting clause in question. It



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would be idle to talk of excepting something out of a statute, which is not embraced, or apparently embraced, in its terms.

The plaintiff declares upon a verbal contract within the statute of limitations, and upon the statute being pleaded, replies a written contract not within the statute. This would seem to be a departure, but we are not called upon to decide whether it is or not, as no objection was made by demurrer or otherwise to the replication. The parties went to trial on the replication, without objection, and thereby waived any defect therein on the score of departure. Chit. on Plead. 685.

It is insisted, however, that the replication does not purport to set up the orders by way of avoiding the plea of the statute, but that they are merely referred to in order to dispense with the necessity of proving their execution on the trial. In this view we do not concur. The replication is loosely and inartificially drawn, but it sets up two classes of facts in avoidance of the answer. First, that the cause of action did accrue within six years, as it is brought upon a running, open, and unsettled account, &c., some of the items of which, are within the six years; and second, that the goods were sold, to the amount of 106 dollars, 76 cents, upon the written orders in question. Waiving any objections on the score of departure, this latter part of the replication seems to be good in avoidance of the answer, so far as it goes. It only takes out of the statute the part of the cause mentioned in the orders; but the party had a right to reply matter that would take a part of his cause of action out of the statute. If it be objected that the replication is defective in purporting to set up matter avoiding the answer entirely, while this branch of it sets up matter avoiding it in part only, the objection may be answered by observing that it should have been made below. The replication, we think, is double, in setting up one set of facts in avoidance of the answer, as to all the cause of action, and also another in avoidance, as to a part of it; but duplicity must be objected to at the proper time or the objection is waived. A motion to strike out, or compel the



plaintiff to elect by which branch of his replication he would abide, would have probably prevailed, as the proper remedy. Even then, the matter (not inconsistent with the complaint), could have been replied in a separate paragraph.

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If a party pass over the objection of duplicity in a pleading, and answer it, he is bound to answer the whole pleading. An answer to one branch of the double pleading is not sufficient, but each part must be answered. *Reno v. Hollowell*, 2 Blackf. 38. Under our code, the replication terminates the pleadings; but allegations of new matter therein are to be deemed controverted as upon direct denial or avoidance, as the case may require. 2 R. S. p. 44, § 74.

The cause having gone to trial upon the replication, the matter therein contained must be deemed to have been controverted; and the plaintiff had the right to introduce the orders in evidence in support thereof, and when thus introduced, we think full legal effect should have been given them, as written contracts not barred by the statute pleaded. It follows that the Court erred in its ruling upon the instructions.

It is assumed, however, that although the Court erred in this respect, the verdict is right on the evidence, there being nothing to connect the orders with the goods for which the suit was brought. But we are of opinion that the jury might very reasonably and properly have inferred, from the evidence before them, that the goods sued for were sold, in part, upon the orders in question.

For the reasons indicated, the judgment will have to be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for a new trial.

*J. W. Gordon*, *H. W. Harrington* (1), and *W. K. Edwards*, for the appellant.

*T. H. Nelson*, for the appellee (2).

(1) *Mr. Harrington*, for the appellant, cited 10 Barn. and Cress. 122; 13 Wend. 267; 2 Blackf. 75; 10 Johns. 86; 6 Barn. and Cress. 603; 3 Mass. R.



May Term, 201; 20 Johns. 33; 3 Wend. 339; 4 *id.* 652; 7 Bing. 163; 1 Lou. Ann. R. 156; 3 *id.* 203; 4 Wend. 643; 4 Tyrw. 173; 3 *id.* 450.

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(2) Mr. *Nelson*, *contra*, cited 1 Blackf. 373; 2 *id.* 340; 1 Ind. R. 333; 2 Pars. on Cont., 1st ed., 351, and note (s); 1 Pet. 362; 6 N. Hamp. R. 235; 9 Geo. 4, ch. 14; 2 R. S. p. 78, § 220; 2 Pars. on Cont., 1st ed., 354, 355, and note (w); 43 E. C. L. 146; 8 Ind. R. 421; 3 Johns. 367; 10 *id.* 259; 14 *id.* 132; 20 *id.* 163; 14 Mass. R. 103; 4 Pick. 137.

### MURPHY and Another v. BLAIR.

As a general rule, if a party suffer judgment to pass in a matter wherein he might have availed himself of a defense at law, chancery will not relieve him; but the rule applies only in cases where such a defense would authorize a Court of law to render a party full relief, in the case presented by the evidence.

Where a party could have set up the facts stated in a bill in chancery, under the general issue in ejectment, but success in that action would have resulted in an unqualified judgment, because a judgment, a sheriff's sale, and certain deeds, referred to in the bill, would still be outstanding as clouds upon the title, it was held that the party might resort to a Court of equity, and that that Court might determine the whole controversy.

Generally, in reference to lapse of time, Courts of equity act in obedience to the statute of limitations.

Thus, in cases of equitable title to land, relief must be sought within the period in which ejectment would lie.

A claim to real estate will not be barred by a lapse of time shorter than that which would bar an action of ejectment.

Where the setting aside of an execution is all the relief to which a party is entitled, it must be sought in a Court of law; but it may be well sought in a Court of equity, in connection with relief not attainable at law.

Thursday,  
May 26.

APPEAL from the *Jackson* Circuit Court.

DAVISON, J.—This was a suit in chancery, instituted in *March*, 1853, by the appellee, who was the plaintiff, against the appellants, who were the defendants.

The bill states, *inter alia*, these facts: The plaintiff was the owner of a tract of land in *Jackson* county, on which, with her son-in-law, one *Felix Cook*, she resided. *Cook*, having in his possession a written instrument for the payment of 1,500 dollars, which he had obtained from plaintiff by fraud, compelled her, by threatening to take her life in



case she refused, to execute to him a cognovit founded on the instrument. Upon the cognovit thus executed, he caused to be entered up, in the *Jackson* Circuit Court, at the *February* term, 1843, a judgment for 1,642 dollars, with costs, &c. At the instance of *Cook*, one *Samuel W. Smith* appeared as his attorney, in the suit on the cognovit, and he also procured the same attorney, without the assent or knowledge of the plaintiff, to appear as her attorney in the same suit, and on her behalf to confess the judgment. *Cook*, having thus recovered said judgment, assigned it to *Daniel H. Long*, who, at the time, had full notice of the fraudulent and unlawful manner in which the written instrument was obtained, the cognovit procured to be executed, and the judgment caused to be rendered. After this, an execution was issued on the judgment, which was levied on the plaintiff's land; and on the 6th of *April*, 1847, the same was offered for sale by the sheriff, when *Long* purchased it for 614 dollars, and received a deed pursuant to the sale; and afterwards, on the 11th of *November*, 1851, he conveyed the same land, by deed in fee simple, to *George H. Murphy*, who, at the time he received the deed, had due notice of the fraudulent conduct of *Cook*, and of the fraudulent nature of the judgment and proceedings, &c. It is averred that the conveyance to *Murphy* was collusive; that no consideration passed from him to *Long*; and that their joint object was to defraud the plaintiff out of her farm; and to produce that result, *Murphy*, in *August*, 1852, brought ejectment against her, in said Court, for the recovery of the land, and has, in that action, recovered judgment, &c.

The relief prayed is, that the written instrument, cognovit, judgment confessed, sheriff's sale and deed, and deed to *Murphy*, be severally set aside for fraud, &c.; and that the plaintiff be restored to her rights, &c.; and that until this case is fully heard, proceedings on the judgment in ejectment be enjoined, &c.

The defendants demurred to the bill; but their demurrer was overruled, and thereupon they answered. Their answers are, in effect, special denials.

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The issues were submitted to the Court, who found for the plaintiff, and, having refused a new trial, rendered a decree in accordance with the prayer of the bill, &c.

The error upon which a reversal of this decree is sought, relates, mainly, to the action of the Court in overruling the demurrer. It is insisted—

1. That the plaintiff had a full and complete remedy in the action of ejectment.

2. That the remedy was barred by lapse of time.

3. That an execution upon a judgment should be set aside, if at all, by motion in a Court of law, and not by bill in chancery.

Where a party suffers a judgment to pass, in a matter of which he might have availed himself by defense at law, chancery will not relieve him. 1 Johns. Ch. 51.—2 Ind. R. 558. This position is assumed in argument, and is, no doubt, correct, as a general rule; but, in our opinion, it applies only in cases where such a defense would authorize a Court of law to render the party full relief, in the case presented by the evidence. It is true, the plaintiff could have set up the facts stated in the bill, under the general issue in the ejectment; but her success in that action would have resulted simply in an unqualified judgment, which could not be adequate relief, because the judgment, sheriff's sale, and deeds, referred to in the bill, would still be outstanding. To remove these clouds from her title, she was compelled to invoke the aid of a Court of equity, and that Court, being rightfully in possession of the cause for the one purpose, was authorized to proceed to determine the whole controversy. 1 Story's Eq. Juris. § 71. Moreover, the plaintiff could have brought a new ejectment: hence, there seems to be no reason why she could not, in its stead, institute a suit in chancery.

But is the remedy, in this case, barred by lapse of time? This is the next question to settle. Generally, in reference to lapse of time, Courts of equity act in obedience to the statutes of limitations. Thus, in cases of equitable titles in land, equity requires relief to be sought within the same period in which an ejectment would lie.



1 Story's Eq. Juris., § 55.—2 *id.*, §§ 1520, 1521.—Ang. on Limit., p. 27, *et seq.* It has been decided that "a claim to real property will not be permitted to be barred by a lapse of time shorter than that which would have barred an action of ejectment at law." *Dugan v. Gittings*, 3 Gill, 138. The rule thus stated applies to the case at bar; because, in this instance, the right supposed to be barred is a right to land, and the plaintiff could have instituted ejectment at any time within twenty years from the time she was dispossessed. R. S. 1843, pp. 795 to 799, §§ 29 to 44. The record shows that that period had not elapsed when the present suit was commenced.

The third point is, that "an execution upon a judgment should be set aside, if at all, by motion to a Court of law." This position, though in the abstract correct, is not available in its application to this case. Where the setting aside of an execution is all the relief to which a party is entitled, it must be sought in a Court of law; but here, such relief, in connection with other relief not attainable in that Court, is well sought in a Court of equity. 1 Story's Eq. Juris. p. 88.

*Per Curiam.*—The decree is affirmed with costs.

*W. T. Otto* and *J. S. Davis*, for the appellants.

*R. Crawford*, for the appellee.

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### HAYS v. MILLER.

Suit upon an award. By the submission, the arbitrators were to "arbitrate all debts, dues, notes, judgments, and demands whatever, of every kind and nature, between the parties." The award was as follows: "We, the arbitrators, having taken upon us the burden of the reference, and having duly considered the allegations and proofs of the parties, do make and publish this our award, of and concerning the matters to us referred, viz.: We find for *Enoch Miller* 4,329 dollars, including the *Enoch Hays* judgment in the *United States* District Court, and the judgment of *Jacob Hays* against *Benjamin Redman, jun.*, in replevin," &c. Signed, &c. A copy of the award was filed with the complaint. It was objected that the complaint



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was defective for not averring that the award was made of and concerning the matters submitted.

*Held*, 1. That the award was part of the complaint, and contained the necessary averment.

2. That the award is not uncertain for including the judgments to which it refers, in making up the aggregate.

3. That although the judgments were not originally between the parties, it may be presumed, in view of the whole award, that, at the time of the submission, they had become existing demands between them, and were properly within the submission.

The statute upon interest does not render the contract upon which an illegal rate of interest is reserved, wholly void, but simply avoids it so far as it reserves illegal interest.

Thus, if illegal interest be given by an award, a defense, in a suit upon the award, seeking to annul the entire award for that reason, is bad. To bring such a defense within the statute, the amount of interest included in the award, should be stated in the pleading.

A submission to arbitrators, where no cause is pending, and where there is no agreement to make the submission a rule of Court, is the mere act of the parties; and in an action to enforce the award, it is no defense to say that it is against law.

Thursday,  
May 26.

### APPEAL from the *Dearborn* Circuit Court.

DAVISON, J.—*Miller* sued *Hays* upon an award. In the complaint, it is alleged that the parties on, &c., at, &c., entered into a written agreement to submit certain matters of difference therein specified, to the arbitrament of *William Jessup, J. S. Ferris, and Samuel Morrison*; that the arbitrators thus appointed met on the day and at the place designated in the submission, and after hearing the allegations and proofs touching the matters of difference submitted, &c., did, on the 16th of *September, 1854*, make an award in writing, of the making of which the defendant afterwards, &c., had notice, &c.

Copies of the submission and award were filed with the complaint, and are set out in the record. By the submission, the arbitrators were to meet at the house of *Samuel Morrison*, on the 6th of *September, 1854*, “and arbitrate all debts, dues, notes, judgments, and demands whatever, of every kind and nature, between the parties.” The award is as follows:

“We, the arbitrators, having taken upon ourselves the burden of the reference, and having duly considered the



allegations and proofs of the parties, do make and publish this our award, of and concerning the matters to us referred, viz.: We find for *Enoch Miller* 4,329 dollars, including the *Enoch Hays* judgment in the *United States* District Court, and the judgment of *Jacob Hays* against *Benjamin Redman*, jun., in replevin; and that the parties pay all costs of this examination equally. [Signed] *William Jessup, Jabez S. Ferris, Samuel Morrison.*"

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Defendant demurred to the complaint; but his demurrer was overruled, and thereupon he answered. His answer contains fourteen paragraphs. Demurrers were sustained to the 6th, 7th, 10th, 12th, 13th, and 14th. The other paragraphs led to issues of fact. The Court tried the cause, and found for the plaintiff 4,447 dollars, that being the amount of the award and interest thereon from its delivery. Judgment was accordingly rendered.

The complaint is said to be defective, because it does not aver that the award was made of and concerning the matters in controversy submitted to the arbitrators. This objection is not tenable. The award, a copy of which is filed with the complaint, contains the proper averment, and having been so filed, became a part of that pleading. 2 R. S. p. 44, § 78.—*Womack v. Womack*, 9 Ind. R. 288.—*Womack v. Dunn*, *id.* 183.

But it is insisted that the award itself is defective; that it is uncertain, and not in accordance with the submission. As we have seen, it says: "We, the arbitrators, &c., do make and publish this our award of and concerning the matters to us referred, viz.: We find for *Enoch Miller* 4,329 dollars, including the *Enoch Hays* judgment in the *United States* District Court, and the judgment of *Jacob Hays* against *Benjamin Redman* in replevin." This award is not, in our opinion, objectionable on the ground of uncertainty. It is for a sum certain, and its certainty is not affected for the reason that in making up the aggregate amount, it includes the judgments to which it refers.

But the inquiry arises—Have the arbitrators, by including them, exceeded their authority under the submission? Evidently, these judgments were not originally between



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*Miller v. Hays*; but, in view of the whole award, may we not intend that, at the time of the submission, they had, by assignment, or in some way become existing demands between the parties? If this can be done, then the award may be sustained. It is said to be a maxim of the Courts, never to raise a presumption for the sake of overturning an award; but, on the contrary, to make every reasonable intendment in its support. Cald. on Arb. 279. and cases there cited. And, further, it has been decided that "where the words of an award are so comprehensive that they may take in matters not within the submission, yet it shall be presumed that nothing beyond it was awarded, unless the contrary be expressly shown." *Solomons v. M'Kinstry*, 13 Johns. 27. In looking into the award in question, we find this statement: "We, the arbitrators, &c., do make, &c., this our award, of and concerning the matters to us referred." The words "matters to us referred" obviously mean the matters included in the submission. Hence, it must be inferred that the arbitrators, having considered these judgments, regarded them as matters properly within the scope of the authority under which they acted. There is, it seems to us, enough on the face of the award, until the contrary be shown, upon which to rest the presumption that the judgments were legitimately before the arbitrators, and that in the award there is nothing outside the submission. Cald. on Arb. 283.—22 Pick. 144.—20 Verm. R. 132.—1 Rand. 449.—1 Leigh, 294.

Again, it is submitted that the demurrer to the seventh paragraph of the answer should have been overruled. That paragraph, so far as it relates to the point made in argument, avers that the arbitrators, in making up their award, allowed 10 per cent. interest on all claims in favor of *Miller*, and compounded said interest by calculating on both principal and interest, by the year, by which misconduct of the arbitrators, the balance due *Miller* was greatly increased, &c.

It may be noted, that the statute on the subject of interest does not render the contract upon which an illegal rate of interest is reserved, wholly void, but simply avoids it so



far as it reserves the interest. 1 R. S. p. 344, § 4. The defense, then, is objectionable because it seeks to annul the entire award, when, if at all defective, it is only so in the rate of interest which it includes. To bring such a defense within the provisions of the statute, it is essential that the amount of interest included in the award, should be affirmatively pointed out in the pleading.

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But there is another reason why the ruling of the Circuit Court, in its action upon the demurrer, must be sustained. This was a submission where no cause was pending, and there was no agreement to make the submission a rule of Court. The reference, therefore, was as at common law, and the mere act of the parties. *Titus v. Scantling*, 4 Blackf. 89. And there are various decisions to the effect that, in such a case, in an action to enforce the award, it is no ground of objection that it is against law. *Mitchell v. Bush*, 7 Cow. 185.—*Jackson v. Ambler*, 14 Johns. 96.—*Cranston v. Kenny's ex'rs*, 9 *id.* 212.—*Bigelow v. Newell*, 10 Pick. 348. These authorities proceed upon the ground that, "if judges chosen by the parties erroneously decide a question of law, the Court will abide the decision." In this instance, the demurrer concedes that the award contains a rate of interest not allowable by the statute; and the arbitrators, in making such allowance, may have misjudged the law; but the weight of authority, no doubt, is, that an erroneous decision, thus made, cannot be set up in bar of an action on the award. Kyd on Awards, pp. 185, 237, 238.—*Symes v. Goodfellow*, 2 Bing. (N. C.) 532.

But it is insisted that the finding of the Court is unsustained by the evidence. There was, however, no motion for a new trial; and it has been often decided that "where a cause is tried by the Court instead of a jury, the finding of the Court stands precisely like the verdict of a jury, and can only be set aside where a verdict would be." *Priest v. Martin*, 4 Blackf. 311.—*The State v. Swarts*, 9 Ind. R. 222.—*McDonald v. Stader*, 10 *id.* 171. We are referred to *Williams v. The New Albany and Salem Railroad Co.*, 5 Ind. R. 111; but that case, though, in this in-



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stance, it seems to be applicable, will not be allowed to control the question under consideration; because we have recently decided that "the submission of a cause on an agreed statement of facts, does not excuse the failure to move for a new trial." *McDonald v. Stader, supra*. "It is due to the lower Court that its errors, if any, should be pointed out there, so that it may retrace its steps while the record is yet under its control." 9 Ind. R. 222. In this case, there being no motion for a new trial, the sufficiency of the evidence to sustain the finding of the Court must be conceded.

*Per Curiam*.—The judgment is affirmed, with 1 per cent. damages and costs.

*W. S. Holman*, for the appellant.

12	192
127	106
12	192
130	37
12	192
136	696
136	696
12	192
162	277

### DAVIS v. CAMPBELL and Others.

A sheriff's sale will be set aside as erroneous in a direct proceeding, when it would not be held void in a collateral suit.

Where property cannot be sold by the sheriff without appraisement, it cannot be legally offered for sale without appraisement. Such an offer would be a vain act, which no bidder could be expected to notice.

Where the judgment did not direct a sale of real property by the sheriff, without appraisement, and the rents and profits were offered for sale without appraisement, and, no bid being received, the fee simple was sold, it was *held*, that there was no valid offer of the rents and profits, and the sale of the fee simple was, therefore, erroneous.

Where an execution-defendant, during the pendency of a levy upon his real estate, and before the sale, offered personal property to the sheriff, which offer the sheriff disregarded, it was *held*, that the sale of the real estate was erroneous.

Thursday,  
May 26.

APPEAL from the *Randolph* Court of Common Pleas.

PERKINS, J.—Complaint to set aside a sheriff's sale. Answer by the defendant. Trial by the Court. Judgment for the defendant.

The complaint alleged that the property sold was a house and lot; that the judgment did not direct a sale



without appraisement; that no appraisement of the rents and profits was made, though they were offered for sale; that no bid being obtained upon the offer, the fee simple of the property was sold; that while the levy was pending and before the sale, the plaintiff offered other and personal property to the sheriff, and requested that it should be taken, which offer the sheriff disregarded.

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The answer denied the complaint. The evidence is upon the record. A motion for a new trial was denied.

The allegations of the complaint were clearly proved. There is no question upon the weight of conflicting evidence, or upon the point as to whether that given proves the allegations of fact in the complaint. The question is one of law alone.

There are two classes of actions in which questions upon the validity of sheriff's sales arise—

1. Those instituted directly for the purpose of setting aside the sale.

2. Those not thus instituted, but in which the question arises collaterally; as in a suit to recover possession of the property sold.

The rules applied in the two classes are different.

A sale will be set aside as erroneous, in a direct proceeding for that purpose, when it would not be held void in a collateral suit.

The Court below seems to have been governed, in deciding this case, by the rules applied in cases where the question arises collaterally. In this, the Court acted upon a wrong principle.

The suit before us is a direct proceeding to set aside a sheriff's sale. And the question is—Was it substantially erroneous?

The code provides that, in cases like the present, property of the execution-defendant shall not be sold without appraisement. 2 R. S. p. 137. It further expressly provides, that the rents and profits of real estate shall be governed by this provision—in other words, that they shall not be sold without appraisement. *Id.* p. 140.

Where property cannot be sold by the sheriff without



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appraisement, it cannot be legally offered by him for sale without appraisement. Such an offer would be a vain act which no bidder at the sale could be expected to notice—in other words, no man could be expected to bid upon an illegal offer of sale.

The case, then, stands as though a sale of the fee simple had taken place, without an offer of the rents and profits.

But the code provides that the fee simple shall not be sold till after the rents and profits for seven years have been offered. It was so sold in this case, and the sale was erroneous, at least; we do not say it was not void under any circumstances.

Again; the statute gives the right to the debtor to select the property to be first offered for sale. 2 R. S. p. 136. And further, it provides that personal property shall be first levied on and sold, where the execution-defendant does not direct otherwise. *Ibid.*

On all these grounds the sale in question was erroneous and should have been set aside. We make no decision as to whether the sale would or would not have been held void collaterally.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded with instructions to set aside the sale.

*J. Brown, W. A. Peele, and E. L. Watson*, for the appellant.

*S. Colgrove, T. M. Browne, and J. J. Cheney*, for the appellees.

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#### HELM, PRESIDENT, &C., and Another v. SWIGGETT.

An action for damages lies against a corporation for refusing to permit a transfer of stock.

Perhaps a mandamus would lie.

Under the statute regulating "the business of general banking" (1 R. S. p. 152), a bank cannot set up, in defense of a suit to compel the transfer of

12	194
141	450
12	194
164	506



stock, or for damages, that the assignment of the certificate of stock was for an illegal consideration, if the bank has no claim upon the stock for debts due from the assignor.

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Ownership of a certificate of stock in a bank does not constitute the owner a stockholder, without the transfer of the stock to him on the books of the bank.

HELM  
v.  
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APPEAL from the *Fayette* Circuit Court. .

Thursday,  
May 26.

PERKINS, J.—This was a suit against the *Fayette County Bank*, of which *Meredith Helm* was president, to recover the value of two shares of stock in said bank, which the bank refused to permit the transfer of to the purchaser. The suit was by the second assignee of the certificate for said shares. One *Ross*, the first assignor, was made a party defendant, with the bank.

The certificate stated that *Ross* was the owner of two shares of stock, fully paid out, &c., and that the same were transferable only on the books of the said bank, in person or by attorney, on surrender of the certificate. This provision was in accordance with the charter and by-laws of said bank. See 1 R. S. p. 157.

The complaint alleged the facts of the ownership, the assignments, &c., of the certificate, the demand of the transfer of the stock, the refusal, &c., to the damage of the plaintiff of 250 dollars, and concluded with the prayer for judgment for the 250 dollars, or that the defendant transfer the stock.

No motion was made to strike out either alternative of the prayer of the complaint.

An action for damages lies against a corporation for refusing to permit a transfer of stock. Ang. and Ames on Corp. 327. Perhaps a mandamus will lie. Redf. on Railw. 62.

The two main grounds of defense, taken by the bank, were—

1. That the assignment of the certificate by *Ross*, the first assignor, to one *Banes*, the first assignee, was for an illegal consideration.

2. That *Banes* was a debtor to the bank, and that the bank had a lien upon the stock for his indebtedness.



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HELM  
v.  
SWIGGETT.

The first ground is entirely untenable. It was no concern of the bank whether *Ross* transferred the certificate for any, and if so, for what, consideration. If the bank had no claim upon the stock of *Ross* for debts due from him, it was not for her to assume a guardianship over his disposal of it.

If *Ross* desired to prevent the transfer of the stock, by the attorney authorized in the assignments to make it, he should have taken the proper legal steps to restrain such transfer.

The second ground is equally untenable. Conceding, for the argument of this case, that the bank had a lien upon the stock for the debts of the stockholder to the bank, and might refuse to permit a transfer of his stock till such debts were paid; still, it will not aid the defense, for *Banes*, the intermediate owner of the certificate, was not a stockholder. Ownership, simply, of a certificate of stock in the bank, did not constitute the owner a stockholder. It required the transfer of the stock to him upon the books of the bank. *Coleman v. Spencer*, 5 Blackf. 197.—*The New Albany, &c., Co. v. McCormick*, 10 Ind. R. 499. See *Downer v. The Zanesville Bank*, Wright (O.), 477.

Here *Ross*, the owner of the certificate, assigned it, accompanied by a power of attorney to a person named, to transfer the stock upon the books of the bank, to the holder of the certificate. He delivered the certificate to *Banes*. *Banes* then sold, assigned, and delivered the certificate to the plaintiff. The plaintiff called upon the attorney named to transfer the stock; he was ready to make the transfer; the bank refused to permit it, because *Banes*, who had owned the certificate, was a debtor to the bank. But he was not a stockholder, and the bank had no lien upon the stock for his debts.

No error is assigned touching the amount of damages.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*B. F. Claypool*, for the appellants (1).

*J. S. Reid* and *S. Heron*, for the appellee (2).



(1) *Mr. Claypool* cited *Ang. and Ames on Corp.*, §§ 381, 571 to 575; 5 *Blackf.* 197; 1 *R. S.* p. 157, § 21; *R. S.* 1838, p. 98, § 28.

(2) Counsel for the appellee cited *Bird v. Lanus*, 7 *Ind. R.* 615; *Ang. and Ames on Corp.*, §§ 354, 355; *Chit. on Cont.* 387, 712, notes; *Story on Prom. Notes*, 193, 195.

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PAUL  
v.  
ARNOLD.

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PAUL and Another v. ARNOLD.

If a complaint upon a delivery-bond refers to the debt, interest, and costs, shown by the execution, as the amount demanded in the suit, and it appears by such reference that the amount is within the jurisdiction, it is, in this respect, sufficient.

The statute (2 *R. S.* pp. 138, 139, §§ 457, 458), contemplates the insertion in a delivery-bond of a stipulation that the execution-defendant may dispose of the property; but as the stipulation is for his benefit, if he execute the instrument without inserting it, it will be presumed that he waived it, and the bond will be valid without it.

APPEAL from the *Decatur* Court of Common Pleas.

Thursday,  
May 26.

DAVISON, J.—The appellee, who was the plaintiff, sued *John Paul* and *Erastus Floyd* upon a delivery-bond. In the complaint it is alleged, that the plaintiff, at the *July* term, 1856, recovered a judgment in the *Decatur* Court of Common Pleas against *Paul* for 849 dollars, and costs, taxed at 9 dollars, upon which an execution was issued, and, by virtue of which, the sheriff levied on certain articles of personal property belonging to *Paul*, of the value of 1,082 dollars, and thereupon he, with *Floyd* as his surety, executed to the plaintiff the bond in suit, which is in the penalty of 1,800 dollars, and conditioned for the delivery of the property levied on to the sheriff, at the residence of *Paul*, on the 5th of *June*, 1857.

For breach, it is alleged that defendants, or either of them, did not deliver the property as stipulated in the condition of the bond. The complaint concludes thus: "In consideration of the premises, the plaintiff demands judgment for the amount of the debt, interest, and costs, as shown by the execution, together with ten per cent. damages



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PAUL  
v.  
ARNOLD.

thereon, and accruing interest and costs, and other proper relief."

Demurrer to the complaint overruled, and final judgment in favor of the plaintiff for 951 dollars.

There are two assignments of error—

1. That the complaint nowhere demands judgment for any stated sum of money; that the bond sued on is in a penalty of 1,800 dollars, and the amount claimed is not limited within the jurisdiction of the Common Pleas.

2. That the bond is void on its face, because the condition does not state that the execution-defendant might sell the goods levied on at private sale.

These assignments are not maintainable. The concluding branch of the complaint very distinctly refers to the debt, interest, and costs, shown by the execution, as the amount demanded in the suit; and by this reference it sufficiently appears that the aggregate amount demanded is within the jurisdiction of the Common Pleas. It is true, the mode in which the demand is stated is not in any approved form; but, in this instance, it seems to be substantially sufficient.

The second assignment of error remains to be considered. We have a statute which says:

"Any personal property taken in execution, may be returned to the execution-defendant by the sheriff, upon the delivery, by the defendant to him, of a written undertaking, payable to the execution-plaintiff, with sufficient surety, &c., to the effect that the property shall be delivered to the sheriff at the time and place named in the undertaking, to be sold, &c., or for the payment to the sheriff of the appraised value thereof, or when the same is not appraised, then of the fair value of the same." 2. R. S. p. 138, § 457.

Another section provides that the sheriff, before he delivers the property to the defendant, shall cause it to be appraised, &c.; and the defendant may sell or dispose of it, paying the officer the full appraised value thereof. *Id.* p. 139, § 458.

These provisions evidently contemplate the insertion, in the written undertaking, of a stipulation to the effect that



the execution-defendant may dispose of the property; but the stipulation is for his benefit, and having executed the instrument without its insertion, it must, in the absence of proof to the contrary, be presumed that he waived it. The omission to insert the stipulation does not, in our opinion, affect the validity of the instrument in suit. *Patterson v. Brown*, 1 Ind. R. 567.

*Per Curiam*.—The judgment is affirmed with 3 per cent. damages and costs.

*M. M. Ray* and *T. A. McFarland*, for the appellants.

*R. Robbins*, *J. S. Scobey*, and *W. Cumback*, for the appellee.

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1859.

Riggs  
v.  
ADAMS.

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RIGGS v. ADAMS.

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144 90

Action commenced before a justice of the peace, upon a promissory note. No answer. On the trial, the defense was, that the note was given for an illegal consideration, namely, for services rendered by the plaintiff for the defendant as clerk of the defendant's lottery office. There was no evidence of any special contract before the services were performed; nor was there any evidence that the plaintiff had performed any services of an illegal character.

*Held*, 1. That the action having been commenced before a justice, evidence of the consideration was admissible without answer.

2. In the absence of proof that the plaintiff performed acts of service which were expressly prohibited by law or public policy, it cannot be conclusively presumed that he did so, because he was the employè of one who might have contemplated or performed such acts; nor can it be presumed, in the absence of proof of the terms of his contract, that by its stipulations he was to perform illegal acts.

The constitutional provision against lotteries, is in restraint of legislative authority to authorize lottery schemes in the state, or the sale of tickets within the state in schemes organized without the state.

APPEAL from the *Henry* Court of Common Pleas.

Friday,  
May 27.

HANNA, J.—This was a suit commenced before a justice of the peace on a promissory note. On appeal to the Court of Common Pleas, there was a judgment for the defendant.



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RIGGS  
v.  
ADAMS.

No answer was filed. Upon the trial, the defense attempted to be made, was, that the note was given for an illegal consideration, namely, for services rendered by *Riggs* for *Adams*, in the capacity of clerk in his, *Adams's*, lottery office, whilst he was getting up and drawing several lotteries.

The first objection is, that evidence of the consideration of the note should not have been received without an affirmative answer. The action having been commenced before a justice of the peace, the evidence was admissible without answer. 2 R. S. p. 455.

The next point made, is, that "drawing a lottery, &c., is not a crime *malum in se*, nor of that class of acts, void as against public morals or public policy."

This question is fully considered in the case of *Swain v. Bussell*, 10 Ind. R. 438. We see no reason to change the conclusion there arrived at.

It is insisted that the acts of the plaintiff were innocent, and not tainted with illegality. The evidence shows that he acted as the clerk of *Adams*, who got up and drew several lotteries, in writing in his lottery office, answering correspondence, making out the numbers of blanks and prizes, &c., but no part of his services were in selling tickets; that he acted generally as his clerk, and the note was given for that service, after the performance thereof. There is no evidence of a special contract before the services were performed, nor of any contract other than an implied one, until the execution of the note sued on.

The question, then, upon this evidence, is, whether, for the services indicated, an implied contract would be presumed in favor of the plaintiff, by which he could recover the reasonable value of his labor. This is the most favorable light in which the case can be put for the defendant.

The introduction of the note made a *prima facie* case for the plaintiff. The evidence of the defendant disclosed the services that were performed by plaintiff as a consideration for the execution of the note, but did not disclose the agreement upon which that service was so performed, or whether there was any such. If the agreement was



general, to labor in a particular capacity, as clerk, for instance, it would not be presumed that illegal acts should form any part of the contemplated service; and if, in the progress of that service, a small portion of that performed at the request of the employer, should consist of illegal acts, a question would then arise whether such acts should prevent the clerk from a recovery of any portion, or of the whole, of his wages. For instance, if the clerk of a dry goods merchant should, by request, sell an article, the sale of which was prohibited as being against law and public policy, should he, by that illegal act, be prevented from recovering his wages during the whole time of his service, or should it defeat the recovery of a portion, and if so, how much (1)?

In this case the evidence shows that, upon a settlement, the note was executed. The law will not presume that the consideration, or any part of it, upon which the note was founded, was illegal.

The position contended for by the defendant, if sanctioned, would exclude the manufacturer of articles that might be used in gaming, such as billiard tables, &c., or the printer of blank lottery tickets, from a recovery for his labor.

We think the true rule is indicated in the case of *Cummings v. Henry*, 10 Ind. R. 112; and when applied as a test, in the case at bar, would require the determination of the question, whether the acts of the plaintiff were such as were prohibited by law, or against public policy; and such as were provided for in the contract of employment.

The constitutional provision is, that "No lottery shall be authorized; nor shall the sale of lottery tickets be allowed."

The first branch of this constitutional provision is evidently in restraint of the legislative authority upon the subject involved, and was intended to prohibit that body from authorizing such schemes to be consummated in the state, under the sanction of the public authorities, either for a public or private purpose. The second branch would, in like manner, restrain the law-making power from authoriz-

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ing the sale, within the state, of tickets in any scheme got up without the state.

The statute, following this constitutional provision, forbids any person, under a fine not exceeding 500 dollars, from selling any lottery tickets, or share in any lottery or scheme for the division of property, to be determined by chance, or from making or drawing any lottery or scheme for division of property, not authorized by law. 2 R. S. p. 437.

The evidence in the case at bar does not disclose that the plaintiff sold either tickets or shares in any lottery or scheme. Indeed, it affirmatively shows that he did not. Nor does it show that he either made or drew any lottery, although he was in the service of one who did.

In the absence of proof that the plaintiff performed acts of service which were expressly prohibited by law or public policy, it will not be conclusively presumed that he did so, because he was in the employ of one who might have contemplated or performed such acts; nor will it be presumed, in the absence of proof of the terms of his contract of employment, that, by its stipulations, he was to perform illegal and unauthorized acts.

It therefore follows that the evidence, upon these points, was not at all sufficient to authorize the finding for the defendant.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. H. Mellett*, for the appellant.

*W. Grose and J. Brown*, for the appellee.

(1) See *Armstrong v. Toler*, 11 Wheat. 258; *Falkney v. Reynons*, 4 Burr. 2069; Chit. on Cont. 570; 5 Blackf. 265; 5 Ind. R. 356.



## SCOTT v. KING and Another.

May Term,  
1859.SCOTT  
v.  
KING.

Suit upon a written agreement for the delivery of four thousand bushels of corn on board of a canal boat—two thousand bushels to be delivered on the 20th of *August*, 1856, and two thousand bushels on the 30th of the same month. Five hundred dollars was to be paid down, 500 dollars on the 8th of *August*, 1856, and 200 dollars "upon the delivery of each load," in all, 1,400 dollars. The complaint averred that the defendant was engaged in buying corn, and possessed a warehouse, at which the corn was to be delivered on board the boat. There was no controversy about the two thousand bushels first to be delivered. It was averred that before the 30th of *August*, at the instance of the defendant, the time for the delivery of the last two thousand bushels was extended, by agreement of the parties, without fixing any day for performance; and that on the 3d of *September*, 1856, the defendant informed the plaintiffs that the last two thousand bushels was ready for delivery whenever they would send a boat (but no day was fixed for such delivery), and requested payment, which was made. General averment of performance on the part of the plaintiffs, and that on the 6th of *September*, 1856, they demanded, and were ready to receive, said two thousand bushels; but that the defendant failed, and still fails to deliver the same, nor did he have it to deliver. Answer, admitting the execution of the agreement, the payment of the money, and that the defendant was engaged in buying, &c., and averring that he delivered the first two thousand bushels; that at the time of payment in full, to-wit, *September* 3, 1856, he had on hand and ready for the plaintiffs, in his warehouse, the two thousand bushels yet at that time due upon the contract, and so informed the plaintiffs; that no arrangement as to the time of receiving the corn was made; that the corn not being called for by the plaintiffs, remained, &c., until the 6th of the same month, when it was destroyed by fire; wherefore it was impossible to put the same on board the boat; that the contract was fully performed by the defendant, except transferring the corn from the warehouse to the boat; that the property, after, &c., became and was the property of the plaintiffs, subject to their control. Demurrer, because the answer did not state facts sufficient, &c., sustained. Amended answer, admitting all the facts stated in the complaint, except the averments of performance by the plaintiffs, and averring that they did not perform, in this, that they failed to send a boat within a reasonable time, *although the corn had been set apart and measured*, and was ready to be transferred to the boat at the time of the receipt of the full amount of the purchase-money, and remained so set apart, &c., until the morning of the 6th of *September*, when the same, yet being in the warehouse, by reason of the want of diligence upon the part of the plaintiffs, was destroyed by fire, &c. Demurrer, for the same cause as before, sustained. Held, that the original answer was bad, and the amended answer good on demurrer; that the admeasurement and setting apart of the corn, and the payment in full of the sum to be paid on delivery, completed the sale; that the transfer of the corn from the warehouse to the boat, although necessary to complete performance, was waived, as necessary to a completion of the sale.



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Friday,  
May 27.

APPEAL from the *Tippecanoe* Circuit Court.

HANNA, J.—The parties made a written agreement by which *Scott* was to deliver, on board of a canal boat, four thousand bushels of shelled, merchantable corn—two thousand bushels to be delivered on the 20th of *August*, 1856, and two thousand bushels on the 30th of the same month. Five hundred dollars was paid down, 500 dollars was to be paid on the 8th of *August*, and 200 dollars was to be paid “upon the delivery of each load,” in all 1,400 dollars.

The complaint averred that the defendant, *Scott*, was engaged in buying corn, &c., and was possessed of a warehouse, at which the corn was to be delivered on board of a canal boat.

There is no controversy about the two thousand bushels first to be delivered.

It is averred that before the said 30th of *August*, at the instance, &c., of *Scott*, and by verbal agreement of the parties, the time for the delivery of the last two thousand bushels, and for the payment, &c., was extended, without fixing any day, &c., for performance; and that, on the 3d day of *September*, 1856, the defendant informed the plaintiffs that the last two thousand bushels were ready for delivery whenever they would send a boat (but no day was fixed for the delivery thereof), and requested the plaintiffs to pay, &c., which the plaintiffs did.

General averment of performance on the part of the plaintiffs, and that on the 6th of said *September*, they demanded, and were ready, &c., to receive said two thousand bushels; that the defendant failed, &c., and still fails to deliver the same, nor did he have it to deliver.

The answer admitted the execution of the written agreement; the payment of the money; that he was engaged in buying, &c.; that he delivered the first two thousand bushels mentioned; that at the time of the payment of said last-named sum, to-wit, *September* 3, 1856, which was in full, he had on hand, and ready for said plaintiffs, in his warehouse, the two thousand bushels yet, at that time, due upon said contract, and that he so informed the said plaintiffs; that no arrangement as to the time of receiving said



corn was made; that said corn not being called for by said plaintiffs, remained, &c., until the 6th of said *September*, when the same, with other, &c., was destroyed by fire, wherefore, it was impossible to put the same on board of a canal boat; that said contract was, by defendant, fully performed, except transferring said corn from the said house to a boat of plaintiffs; that the property after, &c., became, and was the property of the plaintiffs, subject to their control, &c.

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v.  
KING.

To this answer there was a demurrer, because the same did not state facts sufficient, &c.

The demurrer was sustained. This ruling presents the first point.

Thus far we are not informed by the pleadings, by direct averment, whether the corn was in bulk with other corn, or whether it was separated or set apart for the plaintiffs. The plaintiffs admit that they were informed by the defendant, of his readiness to perform. The defendant avers that he had on hand, and ready for the plaintiffs, said corn.

From the contract, we are left to infer that it was expected the four thousand bushels would make two boat loads; and it was thereby directly stipulated that 200 dollars was to be paid at the delivery of each load. These pleadings admit and aver, that upon the information, or notice, thus given by the defendant to the plaintiffs, they paid the said last-named 200 dollars.

We have been thus minute in these statements, because, by the acts of the parties, as stated in the pleadings, we are called upon to determine the question of the fulfillment of the contract—the question of delivery and acceptance—the question of title at the time of the disaster.

Suppose that, instead of the property having been destroyed by fire, the defendant had been suddenly, by some other casualty, driven to bankruptcy, and had made a general assignment of his property, on the 6th of *September*, for the benefit of his creditors, would this two thousand bushels of corn have passed to his assignee, or would these plaintiffs have had the right to take possession of it? If the bankrupt had been able to pay but ten cents to the



May Term, 1859. dollar, this question would have been important to the interest of the plaintiffs.

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v.  
KING. Again; suppose that after the defendant had notified the plaintiffs, and they had made payment, as averred, they had suffered the corn to remain in the warehouse, and had not demanded it; could the defendant have sold it again?

A solution of both these propositions depends, we think, upon whether the corn was in a separate parcel, so as to be distinguished and known.

If it could not be so identified as the property sold to the plaintiffs, the assignees could hold it under the assignment in the one case, and the vendor again dispose of it, in the other.

So, in the case at bar, we think that, as every pleading should be construed most strongly against the pleader, the facts averred were not sufficient to divest the vendor of title in the corn, and vest it in the vendee. There was no direct averment that the corn was in a condition to be distinguished, identified, and known. There was a readiness to perform shown, and notice to the plaintiffs of that fact, and that the plaintiffs, thereupon, did an act which they were, by the terms of the contract, to do upon the delivery of the corn, to-wit, they made payment in full. These acts would have vested the title in the vendee if the purchase had been of a specific article, as a certain horse, or certain cattle, as in the case of *Bradley v. Michael*, 1 Ind. R. 551. Nevertheless, there are decisions which go very far, if not the whole length, in sustaining the defense here attempted to be made. *Whitehouse v. Frost*, 12 East. 612.—*Damon v. Osborn*, 1 Pick. 476.

But we think the weight of authority is against the defendant, if his proof should but sustain this answer. *Murphy v. The State*, 1 Ind. R. 366, and authorities there cited. 1 Pars. on Cont. 441, and cases cited.

After the demurrer was sustained to the answer, the defendant filed an amended answer, in substance, that he admitted all the facts stated in the complaint except the averments of performance by the plaintiffs, and averred that they did not perform, in this, that they failed within a



reasonable time to send a boat, &c., for the corn, &c., although said corn had been set apart and measured by said defendant, and was ready to be transferred to canal boats, at the time of the receipt of the full amount of the purchase-money by the defendant, to-wit, &c., and remained so set apart, &c., until the morning of the 6th of *September*, 1856, when the same, yet being in the warehouse, &c., by reason of the want of reasonable diligence upon the part of the plaintiffs, was destroyed by fire, and the transferring, &c., became impossible, &c. Wherefore, &c.

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KING.

This amended answer was demurred to, and the demurrer sustained, on the ground that it does not state facts sufficient, &c.

This ruling presents the remaining point to be considered in the case.

It should be borne in mind that the complaint states that on the 3d of *September*, the defendant notified or informed the plaintiffs that he had the corn ready, and requested payment, which was made in full. The answer avers that at that time the corn was measured and set apart for the plaintiffs. All that remained for the defendant to do was to transfer the corn from his warehouse (which is shown by the pleadings to have been on the canal) on to the boat. This, perhaps, by the terms of the contract, the plaintiffs might have insisted upon, before they paid the remaining 200 dollars; but as they paid that 200 dollars which, by the contract, was not due until the corn was delivered; and as it is averred the corn had then been set apart, so that the same could be identified and distinguished; we cannot see why the transaction from thenceforth should not be governed by the same rules governing the sale of other specific articles of personal property.

In the case cited in 1 Ind. R. 551, *Michael* purchased of *Bradley*, sixteen head of fat cattle for 400 dollars, and as much more as they should come to at four cents a pound when weighed at, &c. He paid 350 dollars, took away part, and was to pay 50 dollars more on receiving the cattle, &c. It is said that, "by the contract of purchase, the property in the cattle passed into *Michael*," &c. So, "by



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a regular sale, without delivery, the property is so absolutely vested in the vendee, that if *A.* sells a horse to *B.* for £10, and *B.* pays him earnest, or signs a note in writing, of the bargain, and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendors custody, still he is entitled to the money; because, by the contract, the property was in the vendee." *Blacks. Comm., Book ii., p. 449.*

Another writer says: "But when everything is done by the seller, even as to parcel of the quantity sold, to put the goods in a deliverable state, the property, and consequently the risk of the parcel, pass to the buyer; and as to so much of the entire quantity as requires further acts to be done on the part of the seller, the property and the risk remain with the seller." 2 *Kent's Comm.* 390.

So much, then, in reference to the sale of a specific article of personal property. The position, that when the corn, in the case at bar, was set apart, and paid for by the plaintiffs, it should be governed by the same rules, and become the property of the vendees, is, we think, sustained by the case of *Thompson v. Gray*, 1 *Wheat.* 75.—3 *Curtis*, 471.

In that case, it appeared that the *Potomac* company had been created a corporation, with authority to raise 300,000 dollars by lotteries, and had published a scheme, &c. *Gray* and one *Milligan* projected another scheme, which was submitted to the managers, together with a proposition, to the effect that if such scheme was adopted, they each engaged to take two thousand five hundred tickets, to be paid for in a certain manner designated, and approved security to be given on the delivery of the tickets. This scheme was approved of, and the original one abandoned; and it was admitted that the proposition was accepted, and became a binding contract between the parties. *Gray* selected two thousand five hundred tickets by delivering a schedule specifying the numbers of the tickets, &c., to the agent of the lottery. Some of the tickets having been disposed of, a second schedule was furnished by *Gray*, who received a part, to-wit, thirteen hundred tickets. The others



he did not receive. An action of trover was commenced by *Gray*, against the agent of the lottery, to recover a ticket against which a prize of 20,000 dollars was drawn, on the second day. The ticket was not one of the thirteen hundred delivered to *Gray*; but on the trial, a bundle containing twelve books of tickets, of one hundred each, was produced by the agent—being the remaining numbers named in the schedule of *Gray*—and amongst others the ticket against which the prize was drawn. On each book was the name of the plaintiff, in his own handwriting, and on the envelope of the whole was indorsed in the handwriting of the agent, the words "*Robert Gray, 12 books.*" The tickets were not paid for, nor security given nor offered before the drawing took place. Chief Justice MARSAHLL, in delivering the opinion of the Court, says: "Was the purchase and sale of the twelve books, not delivered, so complete that the tickets had become the property, and were at the risk of *Gray*?" In answer to this inquiry, he says, among other things, that, "When the vendee, in execution of this contract, selects the number of tickets he has agreed to purchase, and the vendor assents to that selection, when they are separated from the mass of tickets, and those not actually delivered are set apart and marked as the property of the vendee; what then is the state of the contract? It certainly stands as if the selection had been previously made and inserted in the contract itself. An article purchased in general terms from many of the same description, if afterwards selected and set apart with the assent of the parties as the thing purchased, is as completely identified, and as completely sold, as if it had been selected previous to the sale and specified in the contract."

As to the question of security, it was decided that it was not a condition precedent, but that "the managers could have required, and have insisted on this security; but they might waive it without dissolving the contract."

It was there held that the property in the tickets changed when the selection was made and assented to.

So, in the case at bar, the contract was for "shelled, merchantable corn." It is averred that corn was measured and

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set apart; and, we think, that selection was assented to by the plaintiffs by their conduct, in making full payment, and the right to require the corn to be first delivered on the boat, if such right at any time existed, was thereby waived; and the article remained at their risk.

If the general doctrine laid down in the case in 1 Wheat. is correct, that after articles are set apart they are as completely sold as if they had been selected previous to the sale, &c., then the case at bar, after the corn had been set apart, would fall within the reasoning of the same Court in a later case, where the purchasers of pork and flour in the warehouses of the vendors, in *Indiana*, took from each of the vendors a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal boats, soon after the opening of canal navigation.

These evidences of title were afterwards delivered to one *Gibson*, in *New York*, with an order indorsed thereon to said vendors to deliver the property to him. This indorsement and delivery was in consideration of the advance of money then made to said purchasers by *Gibson*, and it was held that the legal effect thereof was the transfer of the legal title and the constructive possession of the property to him. The money was advanced, in the usual course of trade, upon such warehouse documents; and the Court held that the execution and delivery of those documents, by the original vendors, transferred the property and the possession of the pork, &c., to the purchasers, and the vendors from that time held it for them as their bailees; and that, as respects the legal title, there can be no distinction between the advance made by *Gibson* and the case of an actual purchaser. *Gibson v. Stevens*, 8 How. 384. See, also, *Pierce v. Gibson*, 2 Ind. R. 408; *Mansing v. Turner*, 2 Johns. 13. We are of opinion that the demurrer to the amended answer should have been overruled.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. C. Wilson* and *G. Gardiner*, for the appellant (1).

*H. W. Chase* and *J. A. Wilstach*, for the appellees (2).



(1) Counsel for the appellant argued as follows:

The questions involved, arise on the demurrers to the answers, original and amended, and are—

1. Whether, the purchase-money being fully paid, and the corn ready for delivery by *Scott* when called for, the property in it had passed to *King & Co.*, or remained in *Scott*, so as to make the latter responsible for its loss.

2. Whether *King & Co.*, by their want of diligence in sending for the corn, are not liable for a loss suffered, which would not have occurred if the same had been removed in reasonable time.

What is necessary to vest the property in goods sold in the vendee, is a question often made, and we think definitely settled.

In examining the point, we must not forget that there is a wide distinction between the right of property and the right of possession, for each may exist without the other. In the case under consideration, the former, alone, is to be inquired into, as a determination of that settles the question of liability in case of loss, where it happens without negligence.

The following cases are believed to be pertinent:

In *Willis v. Willis' Administrators*, 6 Dana, 48, an exchange of negroes had been agreed upon, though neither party had delivered the possession to the other. Yet it was held that the property passed, and the risk of loss vested accordingly.

In *Whitehouse v. Frost*, 12 East, 614, *A.* sold *B.* ten tuns of oil, to be drawn and measured from a cistern containing forty tuns, and paid the purchase-money. *B.* sold to *C.* on credit, and gave *C.* an order for the oil, which was presented to and accepted by *A.* *C.*'s assignees could maintain trover for the oil, and recover its value from *B.*, of course holding that the sale transferred the property from *A.* to *B.*, and from *B.* to *C.*, although it still remained to be measured; because, as the Court say, nothing remained to be done "for the purpose of ascertaining either the quantity or the price."

In 2 Johns. 13, in an action for non-delivery of beef, which had become unmerchantable after sale, the Court say: "The purchase was made in the autumn of 1804, and the consideration paid the following *January*, at which time there is little or no doubt, that the beef was in good order. It remained, however, in the actual possession of the defendants until the succeeding summer, when it was found to be damaged, and on whom the loss ought to fall is now the point in dispute. The property in the beef was so far transferred, on the payment of the consideration-money, that it must be considered as remaining at the plaintiff's risk."

In *Damon v. Osborn*, 1 Pick. 476, suit was brought to recover twelve thousand bricks, sold by plaintiff to defendant, on the following facts, viz.: Plaintiff sold defendant twelve thousand bricks, at 4 dollars per thousand, to be received by defendant at plaintiff's brickyard, where plaintiff had some forty thousand bricks, and an agent ready to deliver the twelve thousand when called for. Defendant got eight hundred of the bricks and no more, but told the agent he would take the residue of the twelve thousand the next week. The residue were never separated from the kiln, though the agent was ready to deliver them when called for, but defendant never called for them. The language of the Court is this:

"It has been contended, however, that the plaintiff cannot recover, because he has not done all on his part to be done, namely, that he has not separated

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the eleven thousand two hundred bricks from the kiln in which they were. But where the bargain and sale is complete, and the vendee does not take the goods away, an action lies for the price. Here the bargain and sale was complete by the delivery of part. Nothing more was necessary to be done on the part of the vendor, until the vendee should call for the residue. The property was in the vendee."

*Bradley v. Michael*, 1 Ind. B. 551, is also in point, for it was there held that where certain cattle were sold, a part taken away and paid for, and part payment made for the residue which remained in the possession of the vendor, to be delivered on payment of the balance of the purchase-money, the property in the cattle passed to the purchaser, though the right of possession was in the vendor till the balance of the purchase-money was paid.

In 2 Kent's Comm., 8th ed., p. 645, the rule of the common law is thus stated: "When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer." Again, at page 655 of the same volume—"We think the common law very reasonably fixes the risk where the title resides; and when the bargain is made and rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisitions of the statute of frauds, the property, and with it the risk, attach to the purchaser." See, also, note 6 to above page, as well as from p. 645 to 655, inclusive.

The conclusion from these cases, would seem to be almost irresistible, that where the price is certain and the quantity certain, and nothing remains but merely to measure off and deliver the amount sold on demand by the purchaser, then the property is in the vendee and at his risk. In two of the cases cited, the goods sold were part of a larger quantity; yet the quantity sold and the price were both certain. Nothing remained to be ascertained or done except the manual delivery of the goods, which remained in the possession of the vendor at the risk of the vendee.

Apply this to the case under consideration. The quantity sold was four thousand bushels, deliverable, as the complaint charges, at the vendee's warehouse, one-half of which had been delivered; the price was 1,400 dollars, all of which was paid; and nothing remained but the actual manual delivery of the remaining corn to the vendee. At whose risk did it remain in the hands of the vendor?

If, however, it should be thought that an actual setting apart of a specific quantity and bulk of corn was necessary by *Scott* before the title could pass to *King & Co.*, then that was done, as charged in the amended answer, and we think there can be no question that by that act the title was vested in *King & Co.*, and from that time the risk was theirs. Upon this point all the authorities heretofore cited are pertinent, and we refer, in addition, to 2 Kent's Comm., pp. 492, 498; Pothier on Cont. of Sale, part 4, No. 308; *Rugg v. Minett*, 11 East, 309; *Crawford v. Smith*, 7 Dana, 59; *Hanson v. Meyer*, 6 East, 614; *Pierce v. Gibson*, 2 Ind. R. 408.

The other question, viz.: Want of diligence in sending for the corn—is a mixed one of law and fact.

The pleadings show that nearly three whole days elapsed from the time *Scott* informed *King & Co.* that the corn was ready for them, before it was destroyed.



The payment was made at *Lafayette*, and the corn was at *Granville*, in the same county. The day for receiving the corn, under the contract, had passed, when *King & Co.* were, or ought to have been ready for the same; and no pretense is made that anything prevented them from receiving it at any day they chose to send a boat; but they delayed sending until the third day, when the corn had been destroyed.

It is well to notice that nothing is claimed on the ground of *Scott's* negligence in not taking proper care of the corn.

The evidence is all contained in the pleadings and the bill of exceptions, found at the end of the transcript, which contains only the contract and its indorsements.

The trial was by the Court, and the judgment corresponded with the views of the Court on the questions of law raised by the demurrers.

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(2) Counsel for the appellees submitted the following:

We do not propose to examine the authorities cited by the appellant, in detail, with a view of distinguishing them from the case presented in the record before the Court, nor yet to show how far many of them have been substantially overruled in this state. It is enough for our purpose to say, that by this contract the appellant agreed to deliver the corn on board of canal boats, and until that was done no property passed. Any merchantable corn thus delivered, would have been a compliance with this contract. It would, indeed, be a strange doctrine, to allow a warehouseman and grain dealer to set up as a defense to an action of this kind, the fact that he had more than enough corn to fill the contract. Suppose he had. No specific corn was purchased, and the appellees could not replevy the same. Suppose an execution had issued against *Scott*, or suppose he had died, would not the execution-plaintiff in the one case, and the administrator in the other, hold the corn as against the appellees. Here is a test of the ownership.

But in answer to the second point urged by the appellant, we have to say that the verbal alteration of the contract merely extended the time—nothing more. It did not change the terms of the written agreement in any other particular. The corn was to be delivered on board of canal boats—it was not to be set apart and stored.

It is, perhaps, true that had the appellant, after waiting a reasonable time for the appellees' boat, measured the corn and set it apart for the appellees and notified them of that fact, the property in the corn would have passed and been at their risk. But it would certainly be contrary to justice to measure and set apart the corn without any day being fixed for its delivery, and give no notice to the appellees, and still hold them bound by the act. We are aware of the well settled rules governing the rights of parties who purchase or sell specific articles deliverable at a particular time. Then the vendor must set aside the goods to shield himself. But no authority can be found authorizing him to do it in a case where no definite time is fixed, unless notice is given. We, therefore, conclude that the cases cited are not applicable, and that the counsel for the appellant, however much to be commended for their industry, are not entitled to be rewarded by a reversal of this case. As but two questions are argued in appellant's brief, we have treated all others as waived, and have not deemed it necessary to notice them further.



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12	214
130	292
130	308
12	214
137	330
137	687
13	214
141	327

Complaint to redeem mortgaged premises, in substance as follows: That in October, 1853, *Cornelia M. Baker*, being then the owner of the premises in question, with her husband, *Charles F. Baker*, mortgaged the same to one *Martha J. Fish*, to secure the payment of three notes—one for 100 dollars, one for 44 dollars, 62 cents, and one for 55 dollars, 38 cents; that afterwards, said *Martha* assigned the note for 100 dollars, and the mortgage, to *Otis Newton*, who, on the 12th of September, 1854, assigned the note and mortgage to the plaintiff; that the other two notes are owned by *Morse*, and *Morse* and *Woodruff*, who are made defendants; that the mortgage above mentioned is subject to a prior mortgage, executed by said *Martha J. Fish*, and her husband, *Charles F. Fish* (she then being the owner of the property), to one *Samuel Bartlett*, to secure the payment of 200 dollars, which last mentioned mortgage was executed in March, 1853, and was assigned by *Bartlett* to *Hubbard*. Prayer, that plaintiffs be permitted to redeem the senior mortgage, and for other relief. Answer, 1. That, at the commencement of the suit, *Woodruff* was the owner in fee of the premises; that the mortgage executed by *Fish* and wife to *Bartlett*, and by him assigned to *Hubbard*, was foreclosed by *Hubbard*, by advertisement and sale pursuant to a power of sale contained in the mortgage, and at such sale *Woodruff* bid off the premises, and became the purchaser. 2. That said *Cornelia Baker* fully paid and satisfied said note of 100 dollars to *Newton* while he was the owner thereof. 3. That after such sale and purchase by *Woodruff*, *Cornelia*, and her husband, conveyed the premises to the plaintiff by deed, which is the plaintiff's only title to the premises. 4. That the plaintiff acted as the agent of said *Cornelia Baker*, in the payment of the note to *Newton*, and after such payment, he caused to be made an assignment of the note and mortgage by *Newton* to himself, but that such assignment conveyed no interest to the plaintiff; that *Emery Morse* and *Morse* and *Woodruff* are the owners of the other notes secured by the mortgage, and the defendants are willing, and offer to pay whatever may be due thereon. Reply, that the plaintiff denies the matters set up in the answer, except so far as they admit the matter charged in the complaint. For all the purposes of the suit, the plaintiff admits the validity of the sale set up, to *Woodruff*, and he raises no question, except as to his right to redeem the premises, reserving his right to contest the validity of such sale in another suit. The evidence showed that on the 15th of March, 1854, *Baker* and wife executed to the plaintiff a mortgage on the premises in question, to secure the payment of a note for 306 dollars, given by *Baker* to the plaintiff. The mortgage executed by *Fish* and wife to *Bartlett* was dated March 28, 1853; and the sale under the power therein contained, was made on the 31st of December, 1853. Between the date of the *Bartlett* mortgage, and the sale under it, viz., on the 14th of October, 1853, the mortgage by *Baker* and wife to *Fish* was executed, which, together with the note for 100 dollars, came to the plaintiff by assignment. Mrs. *Baker* furnished to the plaintiff the money paid to *Newton*, to procure the assignment of the note and mortgage to the plaintiff; but from the evidence, it appears to have been the intention of the plaintiff and Mrs. *Baker*,



not thereby to cancel or extinguish the note or the mortgage, but to place the plaintiff in a position to redeem the senior mortgage, and in that manner realize as much of the note for 306 dollars, secured by mortgage on the same premises, as possible.

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*Held*, 1. That although the fee in the premises might have been in Mrs. Baker, and although she furnished to the plaintiff the money with which to procure an assignment of the note, by Newton to the plaintiff, yet that such payment to Newton, with the money thus furnished, did not necessarily cancel or extinguish the note or the mortgage, so far as it was a security for the payment of the note. The transaction, on its face, did not purport to be a payment and extinguishment of the note or mortgage, as they were both duly assigned to the plaintiff. The general rule of law is, that where the mortgage and the fee vest in the same person, and in the same right, the mortgage is merged in the fee simple. But notwithstanding this technical rule of law, it is well settled that a Court of equity will keep an incumbrance alive, or consider it extinguished, as will best subserve the purposes of justice, and the actual and just intention of the party.

2. That under the circumstances, although Mrs. Baker furnished the money that procured the assignment of the note and mortgage to the plaintiff, the transfer to him is valid, and vests in him the same right which Newton held before the assignment.
3. That the plaintiff, holding a mortgage which accrued before the sale, was not in any manner prejudiced thereby, nor were his rights, as such holder, affected by the sale. So far as his rights under the mortgage thus assigned to him are concerned, the case stands as if no sale had been made. To protect himself and secure his own claim, he has a right to redeem the prior mortgage.
4. That the plaintiff, holding a note and mortgage executed before the sale, and the sale not in any manner affecting his rights, so far as that note and mortgage are concerned, he has a right, for the purpose of securing the benefit of his mortgage, to redeem the prior incumbrance.

APPEAL from the *Lagrange* Court of Common Pleas. Friday,  
May 27.

WORDEN, J.—Complaint by the appellant against the appellees, to redeem certain mortgaged premises.

The substantial facts set up in the complaint, are, that in *October*, 1853, *Cornelia M. Baker*, being then the owner of the premises in question, with her husband, *Charles F. Baker*, mortgaged the same to one *Martha J. Fish*, to secure the payment of three notes—one for 100 dollars, one for 44 dollars, 62 cents, and one for 55 dollars, 38 cents; that afterwards, said *Martha* assigned the note for 100 dollars, and the mortgage, to *Otis Newton*, who, on the 12th of *September*, 1854, assigned the note and mortgage to the plaintiff; that the other two notes are owned by *Morse*, and *Morse* and *Woodruff*, who are made defendants; that



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the mortgage above mentioned is subject to a prior mortgage executed by said *Martha J. Fish*, and her husband, *Charles F. Fish* (she then being the owner of the property), to one *Samuel Bartlett*, to secure the payment of 200 dollars, which last-mentioned mortgage was executed in *March*, 1853, and was assigned by *Bartlett* to *Hubbard*. Prayer, that plaintiffs be permitted to redeem the senior mortgage, and for other relief.

The defendants answered, setting up—

*First.* That at the commencement of the suit, *Woodruff* was the owner in fee of the premises; that the mortgage executed by *Fish* and wife to *Bartlett*, and by him assigned to *Hubbard*, was foreclosed by *Hubbard*, by advertisement and sale pursuant to a power of sale contained in the mortgage, and at such sale *Woodruff* bid off the premises and became the purchaser.

*Second.* That said *Cornelia Baker* fully paid and satisfied said note of 100 dollars to *Newton*, while he was the owner thereof.

*Third.* That after such sale and purchase by *Woodruff*, *Cornelia*, and her husband, conveyed the premises to the plaintiff by deed, which is the plaintiff's only title to the premises.

*Fourth.* That the plaintiff acted as the agent of said *Cornelia Baker*, in the payment of the note to *Newton*, and after such payment, he caused to be made an assignment of the note and mortgage by *Newton* to himself; but that such assignment conveyed no interest to the plaintiff; that *Emery Morse* and *Morse* and *Woodruff* are the owners of the other notes secured by the mortgage, and the defendants are willing, and offer to pay whatever may be due thereon.

For replication, the plaintiff denies the matters set up in the answer, except so far as they admit the matter charged in the complaint. For all the purposes of the suit, the plaintiff admits the validity of the sale set up, to *Woodruff*, and he raises no question, except as to his right to redeem the premises, reserving his right to contest the validity of such sale in another suit.



Trial by the Court, finding and judgment for the defendants, a motion for a new trial being overruled.

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It appears by the evidence, which is set out in the bill of exceptions, that, on the 15th of *March*, 1854, *Baker* and wife executed to the plaintiff a mortgage on the premises in question, to secure the payment of a note for 306 dollars, given by *Baker* to the plaintiff. The mortgage executed by *Fish* and wife to *Bartlett*, was dated *March* 28, 1853; and the sale, under the power therein contained, was made on the 31st of *December*, 1853. Between the date of the *Bartlett* mortgage, and the sale under it, viz., on the 14th of *October*, 1853, the mortgage by *Baker* and wife to *Fish* was executed, which, together with the note for 100 dollars, came to the plaintiff by assignment.

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Mrs. *Baker* furnished to the plaintiff the money paid to *Newton*, to procure the assignment of the note and mortgage to the plaintiff; but from the evidence, it appears to have been the intention of the plaintiff and Mrs. *Baker*, not thereby to cancel or extinguish the note or the mortgage, but to place the plaintiff in a position to redeem the senior mortgage, and in that manner realize as much of the note for 306 dollars, secured by mortgage on the same premises, as possible.

We are of opinion, that, although the fee in the premises might have been in Mrs. *Baker*, and although she furnished to the plaintiff the money with which to procure an assignment of the note, by *Newton* to the plaintiff, yet such payment to *Newton*, with the money thus furnished, did not necessarily cancel or extinguish the note, or the mortgage, so far as it was a security for the payment of the note. The transaction, on its face, did not purport to be a payment and extinguishment of the note or mortgage, as they were both duly assigned to the plaintiff. The general rule of law is, that where the mortgage and the fee vest in the same person, and in the same right, the mortgage is merged in the fee simple. But, notwithstanding this technical rule of law, it is well settled that a Court of equity will keep an incumbrance alive, or consider it extinguished, as will best subserve the purposes of



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*Forbes v. Moffatt*, 18 Ves. 384.—*Gardner v. Astor*, 3 Johns. Ch. 53.—*Starr v. Ellis*, 6 *id.* 393.—*Hatch v. Kimball*, 16 Maine R. 146.—*Holden v. Pike*, 24 *id.* 427.

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In *Hatch v. Kimball*, it is said, that "It is, in each case, a question of intention whether or not there is an extinguishment of the charge upon the estate. If at the time the mortgage is taken in, the intention to extinguish it appears, that is decisive. If it does not, equity presumes it to be outstanding or extinguished, as the interest of the party may require." *Vide*, also, *Clift v. White*, 2 Kernan, 519.

In the case at bar, it not only appears to have been the intention of the parties to keep the mortgage alive, so far as the note for 100 dollars is secured thereby, but it was evidently for the interest of Mrs. *Baker* that it should be so kept alive. Her equity of redemption had been cut off, by a sale of the property, and if a transfer of the note and mortgage by *Newton* to the plaintiff, would enable the plaintiff to make not only that note, but all or a part of the note for 306 dollars, which he held against *Baker*, out of the property, it would so far pay a debt which would otherwise devolve a personal liability upon her husband. We think that, under the circumstances, although Mrs. *Baker* furnished the money that procured the assignment of the note and mortgage to the plaintiff, the transfer to him is valid, and vests in him the same right which *Newton* held before the assignment.

What is the effect of the sale to *Woodruff*, so far as the interests of the plaintiff are concerned? This must be determined by the provisions of the statutes of 1843, under which the sale was made. By § 58, R. S. 1843, p. 464, it is provided that "No mortgagee of the same premises, or any part thereof, whose title accrued prior to such sale, &c., shall be prejudiced by any such sale, nor shall their rights or interests be, in any way, affected thereby."

The plaintiff, holding a mortgage which accrued before the sale, was not in any manner prejudiced thereby, nor were his rights as such holder in any manner affected by



the sale. So far as his rights under the mortgage thus assigned to him are concerned, the case stands as if no sale had been made. To protect himself and secure his own claim, he has a right to redeem the prior mortgage. Whether or not his right to redeem could be defeated by a payment or tender to him of the amount due on the note and mortgage thus assigned to him, so as to cut off his claim on the subsequent note and mortgage for 306 dollars, executed after the sale, is a question that has not been argued by counsel, and one which we do not decide. But the plaintiff, holding a note and mortgage executed before the sale, and the sale not, in any manner, affecting his rights, so far as that note and mortgage are concerned, he has a right, for the purpose of securing the benefit of his mortgage, to redeem the prior incumbrance. If a payment or tender of what may be due on the mortgage thus held by assignment, would defeat the plaintiff's right to redeem, no such tender or offer of payment is made. The offer to pay, contained in the pleading of the defendants, is confined to the other two notes secured by the mortgage, and in the hands of some of the defendants.

We are of opinion, that upon the law and the facts in the case, the plaintiff was entitled to relief, and that a new trial should have been granted.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for a new trial.

*J. B. Howe*, for the appellant (1).

*J. M. Flagg* and *O. H. Smith*, for the appellees (2).

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(1) *Mr. Howe* argued as follows :

The holder of one of several notes may foreclose in chancery, making the other holder or holders parties. *Stanley v. Beatty*, 4 Ind. R. 134. It follows that he may, in like manner, file a bill to redeem, making the other holder or holders parties. The appellant was the holder of the note last falling due. The appellees, holding the other notes first falling due, are entitled to priority of payment. *Id.* 135. This, however, may not be important in the decision of the present question, the case having been argued and decided below wholly upon this question—What effect upon the appellant's right to redeem had the fact which he stated in his answer to appellees' written interrogatories, that the money with which the junior mortgage and the note of 100 dollars last falling due, were purchased by him of *Newton*, the holder and assignee thereof, was advanced by *Mrs. Baker*?



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The object of Mrs. *Baker* in furnishing the money, as stated in the appellant's answer to the interrogatories, was to enable him, by redeeming the first mortgage, to secure to himself the amount of a third mortgage, executed by Mrs. *Baker*, after the foreclosure sale, for money loaned: the premises having been sold, in fact, at much less than their value. The motive is only material for the purpose of showing clearly, if indeed it is not to be presumed, that Mrs. *Baker* did not intend simply to pay off the note held by *Newton*. The answer to the interrogatories shows plainly that the particular object was to enable appellant to redeem and obtain payment of his third mortgage, and give Mrs. *Baker* the benefit of any surplus that might possibly be left, after paying off all incumbrances, by selling the property at a fair price. It cannot be imagined that Mrs. *Baker* would voluntarily discharge the note, and thereby the mortgage, when in the hands of *Newton* the latter was valid and outstanding, and could be resorted to for the purpose of obtaining satisfaction of the former. She was also indebted to the appellant at the time, and the effect of the advance of the money by her, was merely to give the appellant a good security in the shape of the note and mortgage assigned to him by *Newton*, in the place, so far, of his defective security for the loan he had made her. But it is immaterial who advanced the money; for the general rule in equity is, that if it be for the interest of the assignee of a mortgage, that it be upheld, it shall be considered as subsisting. *Holden v. Pike*, 24 Maine R. 427. Even if no assignment had been made by *Newton*, but the amount of his note and mortgage merely paid to him, without any intention expressed one way or the other, equity would presume the mortgage either outstanding or extinguished, just as the interests of the appellant might demand. His interests would, in such case, demand that it be deemed outstanding. *Hatch v. Kimball*, 16 Maine R. 146.

In this case, Mrs. *Baker*, who furnished the money, was one of the mortgagors in the junior mortgage assigned to the appellant by *Newton*. Her interest in the equity of redemption was gone by the foreclosure, and she had no remaining interest in the premises. If the note and mortgage had been purchased of *Newton* entirely for her benefit, there could be no merger of the mortgage interest in the equity of redemption; for she had no such equity. She signed the note, however, accompanying that mortgage, as well as the mortgage; but this amounted to nothing—no more, certainly, than her joining with her husband in the covenants in a deed would bind her. In the latter case, the covenants would be her husband's only: in the former the note was her husband's only. There was nothing to prevent her from purchasing the note and mortgage through a trustee, in order to make the same available against the mortgaged property, after redeeming the prior mortgage.

But she made no such purchase. The purchase was first for the benefit and security of the complainant, who, as the pleadings and evidence show, had loaned money to her; and in the next place, she had only the contingent benefit and advantage of any surplus which might possibly remain, after satisfying all the claims. It is due to the judge below to say, that he probably did not fully apprehend the nature of the question, or he could not have rendered such a decree.

The authorities are so plain, and the equity so clear, that where there is an intention to redeem, that intention shall be supported, even when there may be a technical merger, and that, as a general rule, when no intention is expressed,



the Court will consider what is most to the advantage of the party paying the money, that it is difficult to imagine any ground upon which the Court can have based the decree. The only ground referred to by the Court was the fact that Mrs. *Baker* advanced the money; and that was the ground upon which the appellees' counsel argued the case, and will, most probably, be the only ground upon which he will seek to sustain the decree. This is about as important as the question whether Mrs. *Baker* furnished the money in coin or bank notes. The only imaginary reason for the decree is, that the judge supposed that if Mrs. *Baker* furnished the money, and it was actually paid to *Newton* as her money and for her benefit alone, there would be a merger of the mortgage interest in her equity of redemption, or she would be merely paying her own debt. The first position is not true, as already shown, for she had no equity of redemption; and if she had, there was no merger necessarily, if equity required otherwise. *Peet v. Beers*, 4 Ind. R. 46.

The second position is equally untenable; for the debt was not her debt, although she signed the note, but her husband's only—she being incapable of thus binding herself. 1 Pars. on Cont. 286. A married woman cannot even indorse a note made payable to her before coverture; still less one made payable afterwards. *Id.* 212.—*Savage v. King*, 17 Maine R. 301, and other cases cited by *Parsons*. Therefore, not being bound by the note, she could advance money to any one in trust to procure an assignment of the note and mortgage in *Newton's* hands. But it is utterly false in fact, to assume that the assignment was to be for her exclusive benefit. The first object, as already stated, was to enable the appellant to procure the assignment for the benefit of himself, and then for the contingent benefit of Mrs. *Baker*. Courtesy would require me, if possible, to conjecture some other ground on which the judge's decree might be placed, but it is impossible.

The inquiry, who advanced the money, is simply ridiculous. The money advanced by her ceased to be hers after the advance; for after redemption and on foreclosure by appellant, to whom would the mortgage purchased by *Newton* belong? To the appellant, certainly; and the amount of it would be credited upon the mortgage given to the appellant by *Baker* and wife; and, then, after deducting the balance due upon that mortgage, and the amount paid the appellee upon redemption and all costs, any remaining balance would belong to Mrs. *Baker*; but after parting with the money required to purchase the mortgage of *Newton*, she had no legal right and no equity in respect to that particular money. It therefore belonged to the appellant, as did the mortgage purchased with it of *Newton*.

(2) Mr. *Flagg*, for the appellees, submitted the following:

The foreclosure and sale took place under the statutes of 1843, and the rights of the plaintiff as to redemption, so far as they are affected by statutory provisions, will be determined by that code. See R. S. 1843, p. 464, § 58.

The foreclosure and sale by *Hubbard*, and the purchase by *Woodruff*, then, were "an entire bar of all claim of equity of redemption of the mortgagors, their heirs and representatives, and of all persons claiming under them by virtue of any title subsequent to the mortgage," foreclosed by *Hubbard*; and as the plaintiff's mortgage and deed from *Baker* and wife, were both subsequent to such mortgage, he can derive no benefit or rights from them to make out a right to redeem. His right to redeem, if he has such a right, is derived solely

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from the assignment made to him by *Newton*. Did that assignment give the plaintiff in this case any such right?

In the first place, I would remark that this case is one of that large class which come before this Court simply upon the weight of evidence. The cause was tried by the Court, no charges were given or refused, no exceptions taken to any ruling of the Court, no error, in short, alleged, only that from the evidence the Court should have found for the plaintiff, but had the temerity to find for the defendants. The finding of the Court is equivalent to the verdict of a jury; and this Court have shown therein repugnance to setting aside the verdict of a jury upon the weight of evidence, in so marked a manner, and in so many instances, that it may be regarded as almost a rule that no case will be reversed for that cause. *Marsh v. Wellington*, 7 Ind. R. 320. In *Doe v. Herr*, 8 Ind. R. 24, the Court, by STUART, J., say, "That the same sacredness attaches to, and the same presumptions arise in favor of, the finding of the Court, as are to be allowed in favor of the verdict of a jury."

The only evidence in the case, except the deeds and mortgages, was the plaintiff's answers to the interrogatories filed.

The main issue of fact in the case was, whether the mortgage and note assigned by *Newton* to *Howe* had been paid or not, previous to the commencement of this suit. If the plaintiff is to be believed, there can be no doubt on this point. He states expressly, that he did pay them himself with money furnished him by Mrs. *Baker*. As a matter of fact, then, the mortgage assigned by *Newton* to *Howe*, was paid by one of the makers thereof, previous to the commencement of this suit; for in that transaction, *Howe* can only be regarded as the agent of Mrs. *Baker*. And this Court say, per PERKINS, J., in *Ledyard v. Chapin*, 6 Ind. R. 320: "When the money to secure which a mortgage has been executed, is fully paid, it is *functus officio* and dead, and can be no longer available in the hands of any one."

But the plaintiff insists that the Court erred in its application of the law to the facts proven. If this were so, he is not in a position to avail himself of the error. He did not require the Court to make a special statement of the facts and the questions of law decided thereon, and then except to the decision, as he might have done. See 2 R. S. p. 115, § 341; 6 Ind. R. 494.

The motion for a new trial is directed simply to the sufficiency of the evidence to sustain the finding, in the absence of exceptions to errors of law taken at the time. The record in this case, then, presents no question for examination here as to errors of law.

But, waiving this point, we insist that the Court below was right in its law, as well as facts.

In the first place, the plaintiff's title, such as it was, accrued subsequent to the sale under the *Bartlett* mortgage and the purchase by *Woodruff*, and for that reason, he was barred by that foreclosure. R. S. 1843, p. 464, § 58.

Again: The money paid to *Newton* by *Howe* was Mrs. *Baker's*, and was, in legal contemplation, paid by her. *Qui facit per alium, facit per se*. Hence, she, or she and her husband, were the proper persons to redeem, if anybody.

But we contend that neither did, nor could, under that assignment, acquire any such right. We do not deny that equity will, in a proper case, keep alive a mortgage otherwise dead; but it is always to subserve equity or preserve a right. That it will, for the protection of those who are compelled to pay money to protect their rights, subrogate them to the rights of those whose



claims they have been compelled to pay, see *Peet v. Beers*, 4 Ind. R. 46, and cases there cited. But we do deny that the plaintiff or *Baker* did or could by the assignment from *Newton*, bring themselves clearly within the rule laid down in *Peet v. Beers*. *Baker* had no rights to protect, that a Court of equity should be asked to keep alive a dead mortgage for her benefit; for all her claims were expressly barred by the foreclosure of the *Bartlett* mortgage. R. S. 1843, *supra*. And *Howe's* mortgage and deed from *Baker*, being subsequent to such foreclosure, conferred upon him no rights which a Court of equity would protect. Being, then, outside of that rule, even a Court of equity could not call that dead mortgage to life, and all their fancied rights must die with it.

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Mr. *Smith*, for the appellees, added the following:

The question is—Can a junior mortgagee redeem mortgaged premises, in the hands of the purchaser? Conceding this question in favor of appellant, we say this assumed junior mortgage cannot sustain this complaint to redeem, for the following reasons:

*First.* The note and mortgage that he seeks to enforce, were paid off and satisfied before it was assigned to him, leaving the only liability to him between himself and assignee, for the amount he paid for the assignment; and he says he paid nothing. So he has no claim on the mortgage or note.

*Second.* The appellant shows that he claims only a part of the amount secured by the second mortgage; and still he sues alone, without making the other claimants for the residue of the second mortgage parties.

*Third.* The appellant seeks to redeem the lots, without a tender of the amount due on the first mortgage, with the interest and costs of sale, and without bringing the money into Court. This is fatal in all such cases.

*Fourth.* The appellees, in any and all events, had a right to pay off the junior mortgage, and perfect their equitable, as well as legal, title.

### DICKERSON and Others v. TURNER and Another.

A notarial protest of a bill of exchange, showing that on the day when the bill became payable it was presented to the book-keeper of the drawee, at his office, &c., is presumptive evidence of the facts stated in it, and is admissible in evidence in a suit upon the bill.

Whether or not such a protest is sufficient to prove a *proper* presentment, is a question that could not arise on the objection to its admissibility.

Circumstances rendering such a presentment proper, may be proven aside from the protest, if such proof be necessary.

The plaintiffs in this case proved that, since the suit was commenced one of the attorneys for the plaintiffs, being surprised at learning that a defense would be set up, took one of the defendants aside, viz., *Charles Dickerson*, and had a conversation with him in reference to the bill. Witness presented



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the bill to *Dickerson* and asked him if he was liable upon it. *Dickerson* replied that he was willing to stand as surety upon it. Witness told him he was liable or not, and if liable he wanted to know it, and if not, he wanted to know it. *Dickerson* then gave the witness a detailed history of the bill, and the matters out of which it grew. He said the bill was signed by his son, *Hendricks Dickerson* (now deceased), who was one of the firm of *Dickerson, Bethell & Co.* (the firm name in which the bill is drawn), that firm being composed of said *Charles Dickerson, Hendricks Dickerson, Chester Bethell*, and *Frank Bethell*; that *Chester Bethell* and *Aaron Shelby*, composing the firm of *Shelby and Bethell*, owed an old debt to *Turner and Wilson*, the plaintiffs, and this bill was drawn by the firm of *Dickerson, Bethell & Co.*, and indorsed by *Chester Bethell*, to secure the plaintiffs the old debt. Witness told *Dickerson* that if the bill was drawn in that way, he was liable upon it. *Dickerson* admitted he was liable as surety for *Chester Bethell*; that it was *Chester's* debt; and that he, *Hendricks*, and *Frank Bethell* were sureties in the bill for *Chester*. Witness inquired of him why they were putting in a defense to the action. He replied that the debt was just, but there was a settlement to be made between the plaintiffs and *Chester Bethell*. Witness then called his attention to some indorsements of credits on the bill, remarking that these showed that a settlement had already been made. *Dickerson* said he knew nothing about that settlement, but then said that *Chester Bethell* wanted to delay the case until he could hear from his old partner, *Shelby*, who had gone to *Oregon*, and who was a good deal behind with him; that he expected funds from him, or expected, in some way, to throw off the payment of this bill, or a part of it, on to *Shelby*, from whom he expected to hear at every mail.

*Held*, 1. That it seems that accommodation drawers, who unite as drawers with the person for whose accommodation they draw, are entitled to notice of non-payment, if they had reason to expect their principal to provide funds to meet the bill.

2. That the admission, by one of the drawers, of liability as surety, and that the debt was just, was sufficient evidence of a proper presentment and notice of non-payment.
3. The bill, being in evidence, showed the drawers to be joint contractors; and the admissions of one of the drawers bound his co-contractors—they stood, in this respect, in a relation similar to that of existing partners.
4. That an order that the sheriff levy the execution to be issued upon the judgment in this case, upon the property of *Chester Bethell*, and exhaust that, before a levy should be made upon property of the other defendants, upon the ground that he was the principal, and the others sureties, was erroneous, being based wholly upon the admissions of one of the other defendants.

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APPEAL from the *Warrick* Circuit Court.

WORDEN, J.—Action by the appellees, as holders, against the appellants, as drawers, of a certain bill of exchange, drawn by the appellants upon *James Turner*, of *New Orleans, Louisiana*, in favor of *Chester Bethell*, and by him indorsed to the plaintiffs.



There was a demurrer to the complaint, which was overruled, and exception was taken. This ruling is assigned for error, but as no objection is pointed out in the brief of counsel, we shall treat the complaint as good. We see no substantial defect in it.

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Answer in denial, and trial by the Court; finding for the plaintiffs and judgment, overruling a motion for a new trial.

The plaintiffs, on the trial, introduced the bill described, with the indorsement thereon, together with a notarial protest, by which it appears that on the day the bill became payable, it was presented to the book-keeper of the drawee for payment, at his office in *New Orleans*. This protest was objected to as inadmissible, because it did not show a presentment to the drawee, nor show any reason for presenting it to his book-keeper.

We are of opinion that the protest was properly admitted in evidence, as it was presumptive evidence of the facts therein stated, to-wit, a presentment of the bill to the book-keeper of the drawee, and non-payment. *Turner v. Rogers*, 8 Ind. R. 139.

Whether or not it was sufficient to prove a proper presentment, is a question that did not arise on the objection to its admissibility. Admissibility is one thing, sufficiency, another. Without undertaking to determine whether the protest furnished sufficient evidence of the dishonor of the bill, or, in other words, whether a presentment to the book-keeper of a drawee, at his office, is *prima facie* sufficient, or otherwise, we think circumstances rendering such presentment proper, may be proven, aside from the protest, if such proof be necessary.

The plaintiffs further proved, that since the suit was commenced, one of the attorneys for the plaintiffs, being surprised at learning that a defense would be set up, took one of the defendants aside, viz., *Charles Dickerson*, and had a conversation with him in reference to the bill. Witness presented the bill to *Dickerson* and asked him if he was liable upon it. *Dickerson* replied that he was willing to stand as surety upon it. Witness told him he was liable



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or not, and if liable he wanted to know it, and if not, he wanted to know it. *Dickerson* then gave the witness a detailed history of the bill, and the matters out of which it grew. He said the bill was signed by his son, *Hendricks Dickerson* (now deceased), who was one of the firm of *Dickerson, Bethell & Co.*, (the firm name in which the bill was drawn), that firm being composed of said *Charles Dickerson, Hendricks Dickerson, Chester Bethell*, and *Frank Bethell*; that *Chester Bethell* and *Aaron Shelby*, composing the firm of *Shelby and Bethell*, owed an old debt to *Turner and Wilson*, the plaintiffs, and this bill was drawn by the firm of *Dickerson, Bethell & Co.*, and indorsed by *Chester Bethell*, to secure the plaintiffs the old debt. Witness told *Dickerson* that if the bill was drawn in that way, he was liable upon it. *Dickerson* admitted he was liable as surety for *Chester Bethell*; that it was *Chester's* debt, and that he, *Hendricks Dickerson* and *Frank Bethell* were sureties in the bill for *Chester*. Witness inquired of him why they were putting in a defense to the action. He replied that the debt was just, but there was a settlement to be made between the plaintiffs and *Chester Bethell*. Witness then called his attention to some indorsements of credits on the bill, remarking that these showed that a settlement had already been made. *Dickerson* said he knew nothing about that settlement, but then said that *Chester Bethell* wanted to delay the case until he could hear from his old partner, *Shelby*, who had gone to *Oregon*, and who was a good deal behind with him; that he expected funds from him, or expected in some way, to throw off the payment of this bill, or a part of it, on to *Shelby*, from whom he expected to hear at every mail.

The question arises, whether, on the foregoing evidence, the plaintiffs were entitled to recover.

It is insisted, on the part of the appellees, that the evidence shows a want of funds of the drawers in the hands of the drawee, and, therefore, there was no need of any proof of dishonor of the bill and notice to the drawers. It is doubtful whether this proposition can be maintained as against accommodation drawers, as were the defendants in



this case. *Cory v. Scott*, 3 B. and Ald. 619.—*Norton v. Pickering*, 8 B. and C. 610.—Chit. on Bills, 438. To be sure *Chester Bethell*, for whose accommodation the bill was drawn, was one of the drawers; but if the other drawers had taken up the bill, they would have had a remedy against him for the amount thus paid. A case similar to the present, in this respect, has recently been determined in Ohio. *Abiser v. Trooniger's ex'rs*, 7 Ohio State R. 281. It was there held that accommodation drawers, who unite as drawers with the person for whose accommodation they draw, are entitled to notice of non-payment, if they had reason to expect their principal would provide funds to meet the bill.

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But however this may be, we think the statements made by *Charles Dickerson* are sufficient to sustain the finding of the Court. There is a distinct admission of liability, as the surety of *Chester Bethell*, that the debt was just; and from the whole tenor of the conversation, it is evident that *Dickerson* did not contemplate any objection to payment, on the ground that the bill had not been properly presented to the drawee for payment, and the defendants notified of the non-payment.

It will be observed that the evidence does not show that the defendants were discharged by the *laches* of the holders of the bill. Where such discharge is not shown, a promise to pay the bill by the drawer is presumptive evidence of due notice. Edwards on Bills, 625.

Here, there was no direct promise on the part of *Dickerson* to pay the bill; but there was an admission of liability, which is the very thing inferred from the promise. "The cases go to this point only, that if, after the dishonor of the bill, the drawer distinctly promises to pay, that is evidence from which it may be inferred he has received notice of the dishonor; because men are not prone to make admissions against themselves; and, therefore, when the drawer promises to pay, it is to be presumed he does so because he knows the acceptor has refused. The promise is not direct evidence of the fact; but, in the language of Mr. Justice BAILEY, where a party to a bill or note, knowing it



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to be due, and knowing that he was entitled to have it presented, when due, to the acceptor or maker, and to receive notice of its dishonor, promises to pay it, this is presumptive evidence of the presentment and notice, and he is bound by the promise so made." *Id.* 652. And, again, says the same author, p. 654, "Where it does not appear that the drawer or indorser has been discharged by the *laches* of the holder, a qualified promise, taken in connection with the facts and circumstances, has been held in several cases presumptive evidence of demand and notice. As an admission, it is evidence for the jury, like any other conversation; if the liability of the drawer or indorser be conceded by him, the concession is quite as good evidence of demand and notice as a promise to pay; for, as we have said, a promise to pay is deemed an admission of liability; an admission that the bill or note has been presented in time, and that due notice of non-payment has been given."

This is the ground of the decision in *Gibbon v. Coggan*, 2 Camp. 188. There the drawer of a bill being called upon to pay, said "that his affairs were, at that moment, deranged, but that he would be glad to pay it as soon as his accounts with his agent were cleared." Per Lord ELLENBOROUGH. "By *Colburn's* (the drawer's) promise to pay, he admits his liability. He admits the existence of everything which is necessary to render him liable. When called upon for the payment of the bill, he ought to have objected that there was no protest. Instead of doing that, he promises to pay it. I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary."

With this view of the law, we think the Court below was sustained by the evidence in finding that the bill had been dishonored and due notice given.

But it is insisted that, as the admission made by *Dickerson*, was made after the dissolution of the partnership, it could not, in the least, affect the other parties.

This is a question upon which the decisions are conflicting. *Vide Doughton v. Tillay*, 4 Blackf. 433. In a later case, *Kirk v. Hiatt*, 2 Ind. R. 322, it was held, an admis-



sion by a partner, after the dissolution, but made at a time of the payment to him of a partnership debt, is admissible against the other partners. This is upon the principle that there is an agency in the partner, by which he is empowered to receive and receipt for partnership debts.

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In an older case, *Yandes v. Lefavour*, 2 Blackf. 371, it was held to be settled on *American* authority, "that after the dissolution of a partnership, one partner cannot bind the other by the admission of a debt."

This question, however, does not legitimately arise in the case, and, therefore, we shall not pass upon it. We leave it open, because the conclusion to which we have come would be the same, whatever might be our views as to the effect of an admission by a partner after dissolution.

The defendants were partners, but so far as the point under consideration is concerned, we think that circumstance is wholly immaterial. The parties defendant were joint contractors, and had a joint interest in the subject of the suit. Mr. *Greenleaf* says: "that in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one, is, in general, evidence against all. They stand, in this respect, in a relation similar to that of existing partners." 1 *Greenl. Ev.* 174. As one illustration of the rule, a case is cited where two persons were bound in a single bill, and the admissions of one held good against both. In a note to the section cited, the author says, that the propriety, and the extent of the application of the rule, have been much discussed, and sometimes questioned, but it seems now to be clearly established.

The leading case on this subject is that of *Whitcomb v. Whiting*, 2 Doug. 652, which was an action against one of several joint and several makers of a promissory note, and it was held that proof of payment by one of the others, of interest on the note and part of the principal, took the case out of the statute of limitations as against the defendant who was sued. Lord MANSFIELD said: "Payment by one is payment for all, the one acting virtually for all the rest; and in the same manner an admission by one is an admis-



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The doctrine of *Whitcomb v. Whiting*, so far as it holds an admission by one to be sufficient to take a case out of the statute of limitations, has been controverted in this country, and it has been overruled by the Supreme Court of the *United States*, by the Court of Appeals of *New York*, and the Supreme Court of this state, at an early day. *Vide Bell v. Morrison*, 1 Pet. 351; *Van Keuren v. Parmelee*, 2 Coms. 523; *Yandes v. Lefavour*, 2 Blackf. 371; *Kirk v. Hiatt*, *supra*.

The modern and more correct doctrine is, that it is the new promise as such, supported by the original consideration, that takes a case out of the statute, and not the new promise, viewed merely as an admission of the debt. The case of *Bell v. Morrison*, *supra*, is decided upon the ground that the new promise or acknowledgment is not a mere continuation of the original promise, "but a new contract, springing out of, and supported by, the original consideration." Such new contract, neither a joint contractor, nor a partner, after the dissolution, has power to make so as to bind his co-contractor or co-partner.

We do not, however, find much controversy in reference to the other branch of the decision in *Whitcomb v. Whiting*, *supra*, that is to say that the admission of one is an admission by all. In *Bell v. Morrison*, it seems to be taken for granted by the Court, that if the bare admission, without a new agreement either express or implied, to pay the debt, would take a case out of the statute, such admission made by one, would be good as to all.

The proposition cited from *Greenleaf*, has been recognized and acted upon in this Court. *Parker v. The State*, 8 Blackf. 292. *Parker* and his sureties were sued on his official bond as a justice of the peace. *Parker's* letters showing a breach of the bond, were offered in evidence. The Court say: "It is objected that *Parker's* letters are not evidence against the sureties; but we think they were. The obligors were all jointly interested as to the facts admitted in the letters, and the admission of those facts, by



any one of the obligors, was, therefore, admissible evidence against them all." *Vide*, also, *Chapel v. Washburn*, 11 Ind. R. 393.

In *Bridge v. Gray*, 14 Pick. 55, it was said that, "It must be considered as a general rule, that upon each joint contract the admissions of a joint debtor, as to the existence, payment, and settlement of the joint debt, are admissible to bind the joint debtor, and to many purposes the character of joint debtors, when once established, must be deemed to continue until the debt is paid, or by some other means legally canceled, barred, or discharged."

The reasoning of BRONSON, J., in *VanKeuren v. Parmelee*, *supra*, strongly militates against this doctrine; but we think it safer to adhere to it, as it seems to be thoroughly established, than to unsettle the rule.

Applying the principle to the case at bar, it seems to us that the admissions of *Charles Dickerson* must be good as against all the defendants. The production of the bill in evidence made out a case of joint contract. There was no controversy as to the making of the bill by the defendants. The admissions were not of facts necessary to be proven, in order to show a joint contract. The admissions of one, that they were joint contractors, could not be received as against the others; because, until the joint contract is proven by competent testimony, there is no ground laid for the admission at all, as against the other parties. But here the joint contract was shown by the bill itself, and this authorized the admission of one of the parties, in reference to it, to be given in evidence against his co-contractor.

The admission of *Dickerson*, that he was liable on the bill, is equivalent to an admission that the bill had been dishonored, and that due notice had been given. Now we cannot see how he could have been liable unless the rest of the defendants were. If the defendants are to be viewed as partners, notice to one was notice to all. If notice to one is not notice to all, then notice must be given to all, in order to hold any liable. *The State Bank v. Slaughter*, 7 Blackf. 133. If he was liable, according to his admissions, they all were. The facts that would make him liable

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TURNER. On the whole, we think the Court did not err in overruling the motion for a new trial.

After the rendition of judgment for the plaintiffs, the Court, upon the testimony adduced upon the trial, made an order that the sheriff levy the execution to be issued upon the judgment, upon the property of *Chester Bethell*, and exhaust his property, before a levy should be made upon the property of the other defendants, upon the ground that said *Chester* was principal, and the other defendants sureties. To this order, *Chester* excepted.

We think this order was wrong. There was nothing before the Court to show that the other defendants were sureties merely for *Chester*, and that he was the principal debtor, except the admission of *Charles Dickerson*, and that admission is not competent, as between themselves, to prove that fact. An admission by *Chester*, that he was principal and the others sureties, would probably be sufficient; but the statement of *Dickerson* to that effect, could not be received for that purpose, as it would be permitting a man, by his own statement, to make out a case in his own favor, or, in other words, to manufacture testimony for himself.

This order, although wrong, does not at all affect the proceedings of the plaintiffs. 2 R. S. p. 186, § 674. But as the order is assigned for error by said *Chester*, it will have to be set aside.

*Per Curiam*.—The judgment is affirmed with 3 per cent. damages and costs; and the order of the Court, directing the execution to be levied first on the property of *Chester Bethell*, as principal, is set aside.

*C. Baker*, for the appellants (1).

*A. L. Robinson* and *H. Q. Wheeler*, for the appellees (2).

(1) Mr. *Baker*, for the appellants, argued as follows:

The judgment is not sustained by the evidence for two reasons, to-wit:

1. There was no attempt made to prove notice to the defendants or to either of them, of the protest of the bill.
2. There was no evidence of a want of effects in the hands of the drawee.



It is alleged in the complaint and appears from the evidence, that the firm of *Dickerson, Bethell & Co.* was composed of *Charles Dickerson, Hendricks Dickerson, Chester Bethell, and Frank Bethell*, and that *Hendricks Dickerson* died in September, 1855, long prior to the commencement of this action, and by his death the firm was dissolved.

As there was no attempt made to prove notice to the defendants, of the dishonor of the bill, there could be no recovery under the first paragraph of the complaint. Let us inquire whether there was any evidence to justify a recovery against all or any of the defendants under the second paragraph of the complaint, and in prosecuting this inquiry we will endeavor to establish three propositions, to-wit:

1. That there is no evidence of a want of effects in the hands of the drawee of the bill, sufficient to justify a judgment against any of the defendants.

2. That if the above proposition is not established to the satisfaction of the Court, still the evidence did not justify a verdict against the defendants, *Chester Bethell* and *Frank Bethell*, because there is not a particle of evidence tending to show that the drawers of the bill had no effects in the hands of the drawee, except the declarations of *Charles Dickerson*, and these were not binding on the other defendants, because they were made, as the record shows, long after the dissolution of the firm of *Dickerson, Bethell & Co.*, by the death of *Hendricks Dickerson*, as before stated.

3. The order requiring *Chester Bethell's* property to be exhausted before the property of the other defendants should be levied upon, on the ground that he was the principal debtor, was made without any evidence except the admissions or declarations of *Charles Dickerson*.

We insist then, in the first place, that there was no evidence of a want of effects of the drawers in the hands of the drawee, sufficient to warrant a judgment against either of the defendants. To excuse the want of notice of the dishonor of the bill, it was necessary for the plaintiffs to show an entire want of effects in the hands of the drawee, continually, from the time of the drawing of the bill until the time it fell due, and this under such circumstances as to establish that the drawers had no right to expect that the drawee or any other person would pay the bill. *Chit. on Bills*, 345. It is a presumption of law that the drawers have been damaged by want of notice, and almost the only allowed proof of the negative is such a total want of effects as is above stated. *Id.* 435. Whenever, says the same author (p. 438), a party to a bill is entitled to his remedy over against another party, either on the bill or otherwise, as he may be prejudiced by the delay in giving him notice of the dishonor, he is entitled to due notice thereof. Applying these principles to the evidence in this case, let us inquire whether the testimony even tends to show such a want of effects. The only evidence introduced by the plaintiff was—

1. The bill and its indorsement and a memorandum of a credit on the back of it. 2. The protest of the bill. 3. The testimony of *Andrew L. Robinson, Esq.*, one of the plaintiffs' attorneys, as to certain admissions or declarations made to him by *Charles Dickerson*, one of the defendants, immediately before the trial.

The bill, on its face, waived acceptance, and this is relied on as a circumstance to prove a want of effects. The waiver of acceptance amounts to nothing, as without this waiver it was not incumbent on the holder to present the bill for acceptance, it being payable at a fixed time (eleven months) after date.

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Chit. on Bills, 272. But if this waiver did tend to prove a want of effects at any time, it was only at the time of the drawing of the bill; it did not surely tend to prove that the drawee was not placed in funds to meet the bill during the eleven months between its date and its maturity.

The waiver of acceptance, then, does not prove a want of effects in the hands of the drawee. The protest does not, of course, show a want of effects such as would justify an omission of notice, for if it did, there would be no necessity of proving notice of protest in any case, as the protest would establish a want of effects, and this want of effects would excuse the omission to give notice of the dishonor. It will not be pretended that the bill and its indorsements show a want of effects, and this brings us to the only other evidence in the case, viz., Major Robinson's testimony as to the admissions of *Charles Dickerson*, one of the defendants. Now, on the supposition that these admissions were binding on the other defendants, we insist that they do not show such a want of effects as would justify an omission to notify the drawers of the bill of its dishonor. These admissions only show that the bill was drawn by *Dickerson, Bethell & Co.*, for the accommodation of the firm of *Shelby and Bethell*, to pay a debt, which the last-named firm owed the plaintiffs, and that *Chester Bethell*, the payee and indorser of the bill, was a member of both firms, and indorsed the bill to the plaintiffs, one of the plaintiffs being the drawee. Now these very admissions show that the bill was drawn for the accommodation of *Shelby and Bethell*, and that the drawers had a right to expect that they, *Shelby and Bethell*, would provide for it, and as it was given for the debt of *Shelby and Bethell*, the drawers would have their remedy over against that firm, and were, therefore, entitled to notice. The plaintiffs appear to give considerable weight to the circumstance that the bill was drawn on *James Turner*, taken in connection with *Dickerson's* admission that it was given to pay a debt due to himself and his partner *Wilson*; but how this could negative the idea that the drawee was placed in funds to meet the bill during the eleven months that intervened between its date and maturity, I am at a loss to conjecture. I think then I am warranted in saying that the evidence not only does not prove, but does not tend to prove such a want of effects as would excuse the want of notice.

But if I am mistaken in this, still the judgment against *Chester Bethell* and *Frank Bethell* is erroneous, because the admissions of *Charles Dickerson*, upon which it was based, were made after the dissolution of the firm of *Dickerson, Bethell & Co.*, and were, therefore, not binding on the other defendants. It is a well settled principle of law, that after the dissolution of a partnership, one partner cannot, by declarations or acknowledgments, bind his co-partners, but that his power to bind, either by his acts or his declarations, wholly ceases with the dissolution. *Yandes v. Lefavour*, 2 Blackf. 371.—*Kirk v. Hiatt*, 2 Ind. R. 324, 325.—*Chase v. Kendall*, 6 id. 306. The only evidence in the case, except the bill itself, and the protest thereof, consists of the declarations of *Charles Dickerson*, and these declarations were not only made after the dissolution, as before stated, but were clearly made in relation to a transaction with reference to which *Dickerson* was in no sense the agent of the other members of the firm. The statements in Mr. Robinson's testimony in relation to *Dickerson's* refusing to attend Court after being subpoenaed, and in relation to *Bethell's* avoiding the service of the subpoena, might have afforded a good ground for an application



for a continuance, or for an attachment against the supposed delinquents, but surely could not justify a judgment against them without evidence.

The Court not only rendered judgment, but ordered that *Chester Bethell's* property should be exhausted before the property of the other defendants should be levied upon, and this order, as well as the judgment, has no other basis than the declarations of *Dickerson* himself.

We think we have demonstrated, first, that there could be no recovery under the first paragraph of the complaint, because there was no attempt to prove notice of the dishonor of the bill; secondly, that there could be no recovery under the second paragraph of the complaint, because there was no evidence proving, or tending to prove, that the bill was drawn for the accommodation of the drawers, and that they, continuously, from the time of the drawing of the bill until it became due and payable, had no effects, whatever, in the hands of the drawee.

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(2) The following was the argument of *Mr. Robinson*, for the appellees:

It is difficult to ascertain, by the brief of appellants, how many of the assignments of error are relied upon. That there may be no omission, I will take up each assignment separately.

1. In overruling the demurrers to the plaintiffs' complaint.

The demurrers to separate parts of the complaint, calling them the first and second paragraphs (and they are so designated by the clerk, in making up the record), are not well taken, for the reason that only one cause of action is set out. See 2 R. S. p. 38. "When the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph, and numbered." That part of the complaint designated by the clerk as the second paragraph, is the amendment made by *Turner* and *Wilson*, by leave of the Court, showing why notice of the non-payment of this bill of exchange had not been given to the drawer.

The complaint, before the amendment was made, was clearly sufficient, for it contains all the material allegations necessary in suits against the drawers of bills of exchange.

2. In admitting the certificate of protest in evidence.

There was no error in this. See 2 R. S. p. 91, § 281; *Turner v. Rogers*, 8 Ind. R. 139. Our code authorizes the protest of bills of exchange for non-payment, and when protested, the holder is entitled to 5 per cent. damages upon bills of this sort. 1 R. S. p. 379, § 7. Without a protest, the drawers would have been liable to the holder for principal and interest due upon the bill, merely upon a notice of non-payment, or even without a notice, if the facts (as in this case) were such as to render a notice of non-payment wholly unnecessary.

"Certificates of protest shall be received as presumptive evidence of the official character of such instrument and of the facts therein set forth."

A personal presentment for payment of a bill, is not necessary. A presentment at the place of business of the drawee is sufficient. Story on Bills, §§ 350, 351. See, also, *Sharpe v. Drew*, 9 Ind. R. 281. In this case, "the bill was presented to the book-keeper of *James Turner*, the drawee, at his office, in this city (*New Orleans*)."

3. In finding for the plaintiffs on the evidence set out in the record, and in refusing the appellants a new trial.



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The admissions of *Charles Dickerson*, one of the appellants, that they were liable upon this instrument, settles the whole case. These admissions, made deliberately, and with full explanations, show, not only the liability of *Dickerson* himself, but also the liability of all the defendants. They became liable by drawing this bill by the name, style, and firm of *Dickerson, Bethell & Co.*, which, at that date, was composed of four partners, *Charles Dickerson, Chester Bethell, Frank Bethell, and Hendricks Dickerson*, the last-named having died before the commencement of this suit.

*Hendricks Dickerson* drew the bill. It was given to pay an old debt which *Chester Bethell* owed *Turner and Wilson*, and *Charles Dickerson* expressly admits his liability; so that here is a liability fixed upon two of the parties to this bill beyond question. The credits on the back of the bill strongly corroborate the statement made by *Dickerson*.

It is said "there was no evidence of a want of effects in the hands of the drawee of the bill, sufficient to justify a judgment against any of the defendants, and that the waiver of acceptance does not prove a want of effects in the hands of the drawee." The waiver of acceptance does prove that the drawers, *D., B. & Co.*, had no effects in the hands of drawee at that time; but all the facts together—this waiver of acceptance, with the fact that the bill was given in liquidation of an old debt due from one of the drawers (*Chester Bethell*), to *Turner and Wilson*, the bill being drawn upon *James Turner*, one of the firm to whom this old debt was due, with the admissions of *Charles Dickerson* that he was liable as surety—make a pretty strong case. All these facts, taken together, prove that *Turner* not only had none of the money of *Dickerson, Bethell & Co.*, but that *Chester Bethell*, one of the firm, was indebted to *Turner and Wilson*, and could not pay them, and he procured his three partners (the other defendants) to become his sureties for that debt, upon paper which had eleven months to run. They saw fit to put the debt in the form of a bill of exchange, such as is set out in the complaint. At the expiration of the eleven months, he fails to pay, and on being sued for the money, times being hard and cash difficult to raise, he concludes to take further time, and so gets up a few points and brings the case to this Court, with the chances of two years delay, before judgment will be affirmed.

Upon the supposition that *Dickerson, Bethell & Co.* had effects in the hands of *James Turner* (the drawee), they have done what no other men of common sense ever did, and what none but crazy men would do. Let us put the case in a few brief words just as it appears on this record. *James Turner* has 1,497 dollars, 39 cents in his hands belonging to *Dickerson, Bethell & Co.* They draw a bill of exchange for that amount upon *Turner*, and waive acceptance of the bill, and then immediately indorse it over, by *Chester Bethell*, one of their firm, and deliver it to the drawee himself, so that they are left without a shadow of evidence to prove that *Turner* is their debtor for a dollar. And this story is gravely told to the Supreme Court with the expectation of full credence.

But it is said that the firm of *Dickerson, Bethell & Co.* was dissolved by the death of *Hendricks Dickerson*, and that the admissions of *Charles Dickerson* having been made after such dissolution, the other parties are not bound by them, and appellants have cited several authorities. A brief reference to them may not be amiss. The case of *Yandes v. Lefavour*, 2 Blackf. 371, decides that after the dissolution of a partnership, one partner cannot bind another by admissions which have the effect of a new contract, nor can a partner, under



such circumstances, by his admission or promise, revive a debt already barred by the statute of limitations.

The case of *Kirk v. Hiatt*, 2 Ind. B. 322, decides the same principle. The case of *Chase v. Kendall*, 6 id. 306, decides, that after the dissolution of a partnership, the firm is not bound by the new contracts of a partner. But none of those cases are similar to the one under consideration. *Charles Dickerson* did not attempt to make a new contract, nor to revive a debt which had been barred by the statute of limitations.

His admissions were made in reference to facts which had transpired during the partnership. 3 Kent's Comm. 51. In discussing this subject Mr. Kent says: "But there is a distinction between an acknowledgment which goes to create a new contract, and the declarations of a partner made after the dissolution of the partnership, concerning facts which transpired previous to that event, and declarations of that character are held to be admissible."

This authority and reasoning are directly in point, and are sufficiently conclusive. There can be no doubt that these admissions made by *Charles Dickerson*, of these facts set out in the record, and of his liability to pay this bill of exchange, are conclusive against his partners.

These admissions, thus deliberately made, giving all the dates and circumstances touching the transaction, prove, also, that the bill of exchange was duly presented for payment, and was protested for non-payment. Story on Bills, § 320, and note—also § 373, and note 3, which recognizes the doctrine that a promise of payment is an admission that the bill had been duly presented for payment, protested for non-payment, and notice of dishonor given to the drawers. There is no difference in principle nor in legal effect, between an admission of liability and a promise of payment.

Permit me to refer to some peculiar circumstances. Here are plaintiffs endeavoring to bring the defendants, *Dickerson* and *Bethell*, before the Court to make them witnesses in their own cause, and they refusing to attend, one having been actually served with a subpoena, and the other running off to *Kentucky* to avoid the process of the Court.

These facts rendered it necessary to make a witness of Mr. *Robinson*.

These facts, say counsel, might have been the basis of a motion for an attachment for a contempt, or for a continuance; they might also have been made the basis of a motion for striking out the answers of those parties and rendering a judgment against them by default. 2 R. S. p. 96, § 299. And they are now in no worse condition than they would have been if their answers had been struck out, and a default taken for that cause.

The order of the Court that *Chester Bethell's* property should be exhausted before a levy could be made upon the property of the other defendants, was made upon the statute. 2 R. S. p. 186, §§ 674, 675. It is possible the Circuit Court may have committed an error in making this order. The same testimony which proves the plaintiffs' case, proves that *Chester Bethell* is the principal and the other parties are his sureties. If that be the relation of the parties, the order is just and equitable, and this Court will presume that it was made in the proper manner, and upon the application of the proper parties, if the record is silent upon those points.

But that order may be set aside without affecting the judgment. Indeed, it is expressly provided in § 675 above referred to, that those proceedings shall in no wise affect the interest of the plaintiff.

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May Term, In conclusion, permit me to refer to the rules which control this Court in reviewing causes upon the weight of evidence.

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HENDRICKS All the evidence in this case was adduced by the appellees. The appellants offered none whatever.

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In *Chase v. Kendall*, *supra*, this Court holds that "every reasonable intendment in favor of the verdict is to be indulged," &c. In *Kile v. Chapin*, 9 Ind. R. 150, this Court say, that "the finding of an inferior Court is not to be disturbed unless it is palpably wrong."

The verdict and judgment in this case being palpably right, the appellees not only ask that it be affirmed, but that damages be assessed pretty liberally in their favor.

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### HENDRICKS and Another v. COMSTOCK.

In an action instituted in this state, upon a judgment rendered in another state, a plea of the statute of limitations of the latter state will not, as a general rule, be sustained.

There may be a distinction between a statute limiting the time within which an action may be brought, and one simply raising a presumption of payment by lapse of time; but a defense based upon either relates to the remedy, and not to the merits, and is governed by the *lex fori*.

Friday,  
May 27.

APPEAL from the *St. Joseph* Court of Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, sued *Hendricks* and *Cottrell*, administrators of *Alexis Coquilard*, upon a judgment against their intestate, rendered on the 15th of *October*, 1842, by a Court of record, held within and for the county of *Berrien*, and state of *Michigan*.

The defendants' answer contains seven paragraphs. The first is a general denial. By the sixth, it is averred that the judgment sued on was rendered in *Michigan*, more than ten years before the commencement of this suit; and that, by § 24 of ch. 140 of the Revised Statutes of that state, approved *May* 18, 1846, the same is presumed to be paid and satisfied. The section to which the defense refers, is therein set forth, and is as follows:

"Every judgment and decree in any Court of record of the *United States*, or of this or any other state, shall be



presumed to be paid and satisfied at the expiration of ten years after the judgment or decree was entered." May Term,  
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The seventh paragraph alleges payment by the intestate in his lifetime. The other paragraphs make no point in the case, and will not, therefore, be further noticed. HENDRICKS  
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To the sixth paragraph a demurrer was sustained; but to the seventh, the plaintiff replied by a general denial.

Issues of fact were submitted to a jury. There was a verdict for the plaintiff. New trial refused, and judgment.

Upon the trial, the plaintiff produced and gave in evidence an authenticated transcript of the record of the judgment in suit, and rested. And thereupon the defendants offered in evidence a printed statute-book, purporting to be printed under the authority of the state of *Michigan*, and containing the section referred to in their answer. And further, they offered to prove, by a competent witness, that *Coquillard*, the intestate, from the time the judgment was rendered until his death, which occurred in *January*, 1855, was, at all times, abundantly able to pay all his liabilities, and was possessed of a large capital and extensive resources. But their offers were severally resisted by the plaintiff, and refused by the Court.

The only questions noticed in the argument, relate to the action of the Court in sustaining the demurrer to the sixth defense, and in refusing to admit the defendants' evidence.

In support of the demurrer, it is assumed that, to an action instituted in this state, upon a judgment rendered in a sister state, a plea of the statute of limitations of the latter state cannot be sustained.

This position, as a general rule, is no doubt correct. Does it apply to the question raised by the demurrer? The appellants contend that the statute set up in the defense is not a statute of limitations; that it does not limit the time within which an action may be brought, but simply raises a presumption of payment by lapse of time. The distinction thus pointed out may exist. 2 Pars. on Cont. 341, *et seq.* Still, each defense relates to the rem-



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edy, and not to the merits of the action, and the inquiry arises—Are they, in reference to the case made by the record, subject to the same rule of decision? The rule is thus stated: "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern; but the form of remedies, and the order of judicial proceedings, are to be according to the rules of the place where the action is instituted." Story's Conf. of Laws, §§ 558, 576.—13 Pet. 312.—9 How. 407.

The statute before us does not, in any degree, affect the right involved in the action. It relates to a rule of evidence. It declares, in effect, that the plaintiff, in a suit on a judgment, instituted at the expiration of a given period after it was entered, cannot recover unless he proves that it remains unpaid. Thus, the statute seems to be a mere regulation of the order of judicial procedure in reference to actions on judgments presumed to be paid. It must, therefore, be held to relate to the law of the remedy, and cannot, in view of the rule to which we have referred, be deemed operative in any state other than the one in which it was enacted. And the result is, that the action having been instituted in this state, the matter set up in the sixth paragraph is not well pleaded. Such a defense, to be availing, must be founded upon, and brought within, the statutory enactments of the state in which suit is brought. See 2 R. S. p. 78, § 225.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. L. Miller* and ——— *George*, for the appellants.

*A. G. Deavitt*, for the appellee.



## PATTERSON v. CRAWFORD.\*

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141	276

Section 216, ch. 40, R. S. 1843, declaring that any pleading denying or requiring proof of the execution or assignment of any instrument of writing which is the foundation of the suit, and is specially set forth in the declaration, shall not impose the necessity of such proof, unless verified by oath, is continued in force by § 802, 2 R. S. p. 224.

A. was convicted and sentenced to the state prison by a Court of Common Pleas, for an offense of which that Court had not jurisdiction. He was confined at hard labor from *June*, 1853, till *November*, 1854, when he was released on a *habeas corpus*. He assigned his account for the work and labor done during that time for the lessee of the prison, to B., who brought suit against the lessee, joining A. as a party defendant, to recover the amount of the account. *Held*, that the assignment was good, and B. could recover, in his own name, against the lessee, as upon an implied contract, for work and labor done with his knowledge and at his request, although A., while a prisoner, was under the control of the warden of the prison.

An assignee takes precisely the same interest in the assignment of any species of demand, either at law or in equity, that he would have taken before the enactment of the new code. Thus, a demand assignable before the code, so as to vest the real interest in the assignee, will pass by assignment under the code, so as to give the assignee a right of action.

APPEAL from the *Clark* Circuit Court.

Friday,  
May 27.

DAVISON, J.—*Crawford* was the plaintiff below, and *Patterson* the defendant. The complaint alleges that one *William Armstrong* worked for the defendant, at his request, from *June* 7, 1853, till *October* 16, 1854, for which he, defendant, was to pay him, *Armstrong*, what his work was reasonably worth; that said work was worth 350 dollars, which is wholly unpaid, and that *Armstrong*, on, &c., assigned said demand, by writing (a copy of which is filed, &c.), to the plaintiff.

Defendant's answer contains three paragraphs—

1. A general denial.
2. That *Armstrong*, on the 3d of *June*, 1853, was, by the judgment of the *Posey* Court of Common Pleas, convicted of grand larceny, and sentenced to an imprisonment at hard labor in the state prison, for the term of five years;

\* A petition for a rehearing of this case was filed on the 27th of *May*, and overruled on the 2d of *June*.



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and that in pursuance of said judgment, he was imprisoned in said prison, in the custody and under the exclusive control of *David W. Miller*, then and ever since the warden thereof, who compelled him to do work and labor as a convict, conformably to the rules established for the government of the prison, till the 24th of *November*, 1854, when, upon a writ of *habeas corpus*, he was discharged from prison. It is averred that during the imprisonment, the defendant exercised no control over *Armstrong*; that the work performed by him when so imprisoned is the identical work charged, &c., and that defendant never agreed to pay therefor, &c.

By the third defense, the defendant reiterates the facts stated in the second, files a certified transcript of the judgment of conviction in the *Posey* Court of Common Pleas, and submits whether any right of action growing out of the work performed by *Armstrong*, as set forth in the second defense, can be assigned to the plaintiff so as to vest in him a right to bring this suit.

Demurrers to the second and third paragraphs were sustained. The issues made by the general denial were submitted to the Court, who found for the plaintiff 300 dollars; and the Court, having refused a new trial, rendered judgment, &c.

During the trial, the plaintiff offered in evidence the assignment referred to in the complaint. It reads thus:

"We, the subscribers, severally assign and transfer to *Randall Crawford* all our several claims against *Samuel H. Patterson* and *David W. Miller*, or either of them, for labor severally done by us for them, or either of them, at the penitentiary at *Jeffersonville*; and we severally appoint said *Crawford* our attorney, for us severally to demand of said *Patterson* and *Miller*, or either of them, whatever sums may be due us severally, for such labor, and to compromise said demands, or any part of them, and to sue for the same in our several names as our attorney shall judge best. [Signed] *William Armstrong, Henry Davis, John Burk, Joseph Nikerson, John Glavin, Frederick A. Nutter.*"

The introduction of this instrument was resisted, upon



the ground that there was no proof of its execution; but the Court admitted it, without such proof, and the defendant excepted.

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Section 80 of the practice act says:

"Where a writing purporting to have been executed by one of the parties, is the foundation of, or referred to in, any pleading, it may be read in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by a pleading under oath." 2 R. S. p. 44.

This provision is cited in argument; but it does not apply to the admitted evidence, because the writing does not purport to have been executed by one of the parties. *Riser v. Snoddy*, 7 Ind. R. 442.

There is, however, another section of the same act, which provides that "the laws and usages of this state relative to pleadings and practice in civil actions, &c., not inconsistent herewith, and as far as the same may operate in aid hereof, or supply an omitted case, are hereby continued in force." 2 R. S. p. 224, § 802. This, it is said, continues in force § 216 of ch. 40 of the revision of 1843, which declares "that any pleading denying or requiring proof of the execution or assignment of any instrument of writing which is the foundation of the suit, and is specially set forth in the declaration, shall not impose the necessity of such proof, unless verified by oath." The section thus recited is not in conflict with any provision of the new code, but may well operate in aid of the existing rules of practice. Section 802, should, in our opinion, be so construed as to continue in force § 216, and that being done, the rule of practice so continued, fairly applies to the case at bar, and sustains the admission of the written assignment, without proof of its execution.

As we have seen, the complaint avers that *Armstrong* had done work for the defendant at his request, and as the Court found in his favor upon the issues made by the first defense, we must presume, the evidence not being in the record, that the averments in the complaint were fully



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proved. Hence, the only remaining questions in the case, relate to the action of the Court in sustaining the demurrers.

The material facts alleged in the second defense are, that *Armstrong* was sentenced by the *Posey* Court of Common Pleas; that he was imprisoned in the custody of *Miller*, the warden of the state prison, who compelled him to do the work charged, according to the rules of the prison; and that during his imprisonment the defendant exercised no control over him. As the Court of Common Pleas had no jurisdiction of the alleged felony (see *Spencer v. The State*, 5 Ind. R. 41), the judgment of that Court was, of course, void on its face, and can have no influence on the investigation of this cause, other than to show the manner in which *Armstrong* was made to work; and whether *Miller* would be liable for the false imprisonment is a question not before us. Evidently, he could not be held liable for the work and labor charged in the complaint, because it was not performed for him. But it is said that the defendant exercised no control over *Armstrong*. Still he received the benefit of his labor; and it seems to us that the mere fact that *Miller* controlled the action of the supposed convict, while laboring for the defendant, is not an available ground of defense. It is conceded, as a general rule, that "where labor is performed for the benefit of a party, without an express contract, if he knows it, and tacitly assents to it, he will be liable on an implied contract to pay a reasonable compensation therefor." This exposition seems to be correct. Does it apply to the case at bar? That the defendant knew of the labor charged in the complaint, and assented to it, is a proposition which the facts appearing in the record will not allow us to doubt; and for aught that appears in the defense in question, he did know that *Armstrong* had not been legally convicted. The defendant, being lessee of the state prison, and entitled by law to the labor of all those legally imprisoned and of no others, had a right to know, and was, in our opinion, bound to know who were legally in the warden's custody. But there is really nothing in the second



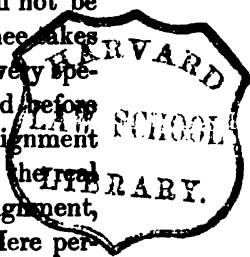
defense inconsistent with the fact of the work having been done for the defendant at his request, and with his knowledge of all the circumstances.

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The third defense assumes that, though the defendant may be liable to *Armstrong*, by reason of the false imprisonment, still his right of action could not be assigned to the plaintiff. The code provides that "every action must be prosecuted in the name of the real party in interest; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." 2 R. S. p. 27, § 4. This section does not authorize, nor does it forbid, the assignment of a thing not arising out of contract. It adopts the equity rule, which required every action to be prosecuted in the name of the real party in interest, and simply declares that that section shall not be deemed to authorize such assignment. An assignee takes precisely the same interest in the assignment of every species of demand, either at law or equity, as he did before the new code. Hence, a demand capable of assignment before the code, so as to invest the assignee with the real interest, is such a demand as will now pass by assignment, so as to give the assignee a right of action. Mere personal torts, such as slander, assault and battery, and the like, which die with the party, and do not survive to his personal representative, are not assignable. *Comegys v. Vasse*, 1 Pet. 213. But in view of a statutory rule of procedure, identical with the one just recited, it has been held that torts for the taking and conversion of personal property, and generally such a right of action for a tort as would survive to the personal representative, may be assigned, so as to pass an interest to the assignee which he can assert in his own name in a civil action, as he formerly might in the name of the assignor, at law. *Robinson v. Weeks*, 6 How. Pr. 161.—*Hodgman v. The Western Railroad Corporation*, 7 id. 493.—*Van Santv. Pl. 108, et seq.*

In the case before us, the false imprisonment, in itself, is a mere personal tort, which would die with the party. Considered alone, it would result in injury to the prisoner, and not in any effective benefit to the party who held him





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in custody. But here, there is seventeen months' labor actually performed in the service of the defendant, and of which he has received the proceeds. For this, in our opinion, a right of action would have survived to the assignor's personal representatives.

The appellee, however, assumes in argument that *Armstrong* had the right to waive the tort and sue in form *ex contractu*; and, the tort being waived, the transaction became one of contract, for all purposes, and, consequently, was assignable as other contracts. This position is supported by authority, and seems to be correct. *Brewer v. Sparrow*, 14 E. C. L. 50.—*Smith v. Hodson*, 4 T. R. 211.—*Smith v. Cologan*, 2 *id.* 188, note (a).—*Ferguson v. Carrington*, 17 E. C. L. 330.—*Lucas v. Godwin*, 32 *id.* 309. The authorities to which we have referred, when applied to this case, induce the conclusion that the assignment before us, had it been made before the code, would have invested the assignee with the real interest in the demand in suit, and authorized him to sue for its recovery in the name of the assignor. And being thus the real party in interest, § 4, which we have quoted, does not forbid, but plainly allows, the assignee to sue in his own name.

It is insisted that *Miller* was a necessary party, and that the proceedings not showing that he was made a party, are, for that reason, erroneous. No objection relative to the want of parties appears to have been made in the Circuit Court. It follows that the alleged error is not available in this Court.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*W. T. Otto* and *J. S. Davis*, for the appellant (1).

*R. Crawford*, in person (2).

(1) Counsel for the appellant submitted the following argument:

The Circuit Court was of opinion that § 80, 2 R. S. p. 44, governed this case. If *Armstrong* had been before the Court, the assignment might have been read in evidence against him without proof, unless the execution thereof had been put in issue by an appropriate plea under oath, and the section would have been applicable. *Armstrong* was not a party to these proceedings, nor can the judgment be pleaded in bar to a suit by *Armstrong* against *Patterson* for the same cause of action. It is evident that the section has no reference to



the question under discussion, for the paper was offered in evidence against *Patterson*, who is not alleged to have executed it, and in a suit wherein the maker of the paper was not a party. The object of the suit was to recover for work and labor done, and not to enforce against *Patterson* any direct or collateral liability arising upon the paper. He was a stranger to it. The point is settled by a decision of this Court. *Riser v. Snoddy*, 7 Ind. R. 442.

\* \* \* \* \*

It is conceded that the conviction of *Armstrong* was not by a Court of competent jurisdiction, as it occurred on the 4th day of June, 1853. *Spencer v. The State*, 5 Ind. R. 41.—*Simington v. The State*, *id.* 479. The Circuit Court, therefore, did right in discharging him from the state prison, and in ordering him to be returned to the jail of Posey county. *Miller v. Snyder*, 6 Ind. R. 1.

It is submitted that the second defense is a bar to this action, and that it presents such a state of facts as renders the warden exclusively liable to *Armstrong* for his detention in the state prison under void process.

Inasmuch as there are many similar cases, the settlement of which will depend upon the determination by this Court of the questions involved in this suit, we might admit, although the record does not disclose it, that *Patterson* was the lessee of the state prison, and that the profits of his lease depended upon the number of the convicts. This does not change the question, and a reply alleging the fact would not avoid the bar.

It is no doubt true that where labor is performed for the benefit of a party, without an express contract, if he knows of it and tacitly assents to it, he will be liable upon an implied contract to pay a reasonable compensation therefor. This rule is not, however, of universal application. Where *A.*, for his own convenience and benefit, builds a house upon the land of *B.*, the latter will not be liable. *Frear v. Hardenburgh*, 5 Johns. 273. So the county commissioners cannot sue a husband for board furnished his wife, who was a pauper. *The Board of Comm'rs, &c. v. Hildebrand*, 1 Ind. R. 555. And where a father and his adult children live together, there is no implied undertaking on either part to pay for services rendered or board furnished. *Resor v. Johnson*, 1 Ind. R. 100.—*House v. House*, 6 *id.* 60. But the presumption, upon which the implied contract rests, may be overcome by proof. It will not be entertained against a party who had no power to direct a discontinuance of the work and whose acceptance of it was not a voluntary act, and no action will lie where it appears that the work was done without his request or privity. The work and labor was done by *Armstrong*, when in custody of the warden of the prison. It is the duty of that officer to receive the prisoners, to keep them in custody, to compel them to work, to enforce the rules for the government and police of the institution, and to discharge the prisoners at the expiration of their term of imprisonment, or when so ordered by a Court of competent jurisdiction. 1 R. S. p. 391.—2 *id.* pp. 379, 382, 383. In the discharge of the duties of his office, he does not incur a divided responsibility, but he, and he alone, is liable. After the decisions in 5 Ind. R. *supra*, he should have returned to the proper counties the prisoners who had been convicted of felonies by the Court of Common Pleas, after the taking effect of the Revised Statutes of 1852. *Patterson* did not receive *Armstrong* into custody, nor could he discharge him therefrom. He had no means of knowing by what authority he was in prison. He had no power to compel him to labor, or to release him therefrom, or in any way to interfere with the regulations of the prison, and the enforcement of

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them by the warden. These circumstances show an absence of any request or privity, and a promise to pay is expressly negated. Suppose that the state, instead of leasing the prison, had conducted it on her own account. Waiving her sovereignty as a bar to a suit, it is clear that no claim would exist against her for the acts of the warden, and it would make no difference whether the action be one nominally *ex contractu* or *ex delicto*, whether for the breach of an implied contract to pay for the value of the work, or the violation of his rights by imprisonment, nor could such a claim be the subject-matter of a set-off by *Armstrong*, in a suit brought by the state. *The United States v. Buchanan*, 8 How. 83, and the authorities there cited. If a party be committed to the state prison, without lawful authority, or be confined there after the expiration of the period for which he had been sentenced by a Court of competent jurisdiction, we cannot see upon what principle of law or justice *Patterson* could be rendered liable for such detention to any extent, much less that he should be compelled to pay such party the full wages of a laboring man.

The remaining questions which this record presents may be discussed upon the assumption that *Patterson* would be liable to *Armstrong*, by reason of the imprisonment of the latter.

Our code provides (3 R. S. p. 27, § 4): "Every action must be prosecuted in the name of the real party in interest, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

The legislature evidently intended to provide one uniform mode of bringing suits in this state. Under our former statutes, the assignment of a chose in action did not, except in a few enumerated instances, vest in the assignee a legal title and interest. Where a Court of chancery had jurisdiction, the assignee of such choses as were the subject of transfer, could prosecute a suit in his own name for the enforcement of his rights. In a Court of law, the party beneficially interested, was compelled to use the name of the party having the legal title to recover. The interests of such a party, have, in this state, always been recognized and protected against any injurious interference by the nominal plaintiff, and even against his admissions. The distinction between actions at law and suits in chancery having been abolished, the party having the interest in the subject of the action must be the plaintiff. Where the claim is assignable by indorsement, the assignee is not a necessary party; but in other cases of assignment of claims arising out of contract, he must, by the sixth section, be made a defendant. Whilst our code has changed the mode of prosecuting a right transferred by an assignment, it has not rendered assignable, rights which were not so before its adoption. Whatever choses and rights were the subjects of transfer before the code, are so now, and such as were not, remain now as they were then.

A thing in action is defined by *Blackstone* (3 Blacks. Comm. 154,) to be "a right founded on, or arising from, contract." Mr. Justice GRIER, in *Sheldon v. Sill*, 8 How. 441, remarks: "The term chose in action is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another by action." These definitions are too narrow, as they exclude demands arising out of tort. Chief Justice BRONSON, in *Gillet v. Fairchild*, 4 Denio, 80, has, with his characteristic clearness, justly observed that "The term chose in action is used in contradistinction to chose in possession. It includes all rights to personal property, not in possession, which may



be enforced by action, and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract. In both cases, the debt or damages of the owner is a thing in action." In its broadest import, the term comprehends demands for wrongs or injuries to the property or person. 2 Wood. Lec. 387.—2 Kent, 351.

Although this is the signification of the term, we have found no adjudicated case where, for the purposes of an assignment, it has been carried beyond a claim due upon contract, or such whereby some special damage has arisen to the estate of the assignor. In *Gillet v. Fairchild*, *supra*, it was held that the receiver of an insolvent corporation, who was empowered by law to sue for and recover "all the estate, debts, and things in action," belonging to the corporation, might maintain trover for the conversion of the personal property of the corporation before the plaintiff was appointed a receiver. This decision was founded upon the express words of the statute. Judge STORY, in commenting upon the operation of the bankrupt law of 1800, in *Comegys v. Vase*, 1 Pet. 193, 213, remarks: "In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment." Under the operation of bankrupt and insolvent acts, where terms of the largest import are used, transferring all rights of action to the commissioners or assignees, it has never, to our knowledge, been held that a demand for damages for a personal tort, would pass. In *North v. Turner*, 9 Serg. and Rawle, 244, an action of trespass de bonis asportatis, was maintainable by the assignee, because it affected the bankrupt's property, and was, therefore, separable from the person; but it was conceded by Judge GIBSON, "that an action for a mere personal injury in the bankrupt, such as slander, assault and battery, &c., could not be maintained."

Independent of the concluding words of the section from our code, *supra*, we hold it to be clear that a right of action could not be transferred to this plaintiff. If such a right could not be the subject of a transfer under an insolvent or bankrupt law, *a fortiori*, it could not pass under a voluntary assignment. *The People ex rel. Stanton v. The Tioga Common Pleas*, 19 Wend. 73.

The section of our code is a literal transcript from the *New York* code. Voorhies' (N. Y.) Code, p. 82.

In *Thurman v. Wells*, 18 Barb. 500, this question was considered by the Supreme Court of *New York*. It was held that the provision in the code of that state did not authorize the assignment of a right of action for an unrecognized claim arising *ex delicto*, and that, consequently, a claim against a common carrier for a breach of duty, could not be assigned. In that case, the assignor was made a party defendant. The very point in controversy has thus been settled adversely to the plaintiff by the highest Court of the state from which we have derived our code of practice.

It may be urged, however, that in the decisions of Courts of the highest authority, it has been directly advanced that the injured party may, in some instances, waive the tort and sue upon an implied contract. We are aware of it. *Cooper v. Helsabeck*, 5 Blackf. 15, is in point. These cases relate to the form of the remedy, and do not touch the question now under consideration. In the case just cited, the owner of a wagon left it with the defendant, who subsequently converted it to his own use. The plaintiff might, therefore, have brought trover for the conversion, or assumpsit upon the implied contract of

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the mandatory to take reasonable care of the property. But in the text-book, cited in the note to that case, it is justly observed that an action of trover cannot be converted into an action of assumpsit for goods sold and delivered, at the option of the plaintiff, but that the right is confined to a particular class of cases. In *Jones v. Hoar*, 5 Pick. 285, it was decided that assumpsit could not be maintained by the owner of land for the value of trees cut and carried away. Chief Justice PARKER remarked, "that where there is no contract, express or implied, an action *ex contractu* will not lie, and that the whole extent of the doctrine seemed to be, that one whose goods had been taken from him, or detained from him unlawfully, may, if the wrong-doer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds." The rule, therefore, is not of universal application, but the question, relating, as it does, exclusively to the form of the action, is of no practical interest in *Indiana*. Our code allows but one form of action. The distinction between tort and contract is a substantial one, existing in the nature of things, and no attempt has been made to abolish it by legislation, or to confound the rights and liabilities which are incident thereto.

In the case of *Cooper v. Helsabeck*, *supra*, the owner of the property could not, after its conversion by the defendant, vest any right in another by a sale or assignment. *Gardner v. Adams*, 12 Wend. 297, is directly in point. In *Hall v. Robinson*, 2 Coms. 293, it is held that the owner may sell property in the possession of another; and if the latter subsequently convert it, the vendee may maintain an action. And in *Thurman v. Wells*, in Barb. *supra*, the doctrine in *Gardner v. Adams*, is reviewed and confirmed.

These cases are cited as establishing the doctrine that whilst there are instances where the owner of property may maintain an action in form *ex contractu*, the right of action is not susceptible of transfer, if it originates in a tort.

So where work has been done for a party, and by his compulsion, decisions may be found affirming his liability in an action in form *ex contractu*, although the preponderance of authority is the other way. In 3 Yeates, 250, the Court said that assumpsit would lie in favor of a free negro, for work and labor, against a person who held him in his service, claiming him as a slave. This decision settled merely the technical question as to the form of the remedy. Whether the party proceeded upon an implied contract, or for a tort, he would be entitled to adequate redress, and where no evil motive is attributed to the defendant, the measure of damages is the same. A party who is wrongfully imprisoned, can recover for the loss of his time; whether the wrongdoer derives any benefit from it or not. So, also, in actions for assault and battery, seduction, and other violations of absolute personal rights, the injured party may recover the expenses incurred, and the value of time lost, and the latter is determined by the occupation of the party. The authorities heretofore cited show that no valid transfer can be made of such rights of action. In *The People v. The Tioga Common Pleas*, 19 Wend. 73, a female out at service was debauched, and the person with whom she resided authorized her step-father to prosecute the suit in his name for her seduction, by an instrument sufficient in form to transfer the damages which might be recovered in the suit. It recited that after the seduction, the girl had returned home to her step-father, where she was likely to occasion him additional expense and



trouble, and contained a stipulation that the suit, although brought in the name of the nominal plaintiff, should be prosecuted at the expense of the step-father, who was to keep the plaintiff harmless from all damages, costs, and charges. An action on the case was brought. The gist of the action was the loss of service, for at common law the relation of master and servant must exist between the plaintiff and the seduced party at the time of the seduction. A recovery was had. The nominal plaintiff acknowledged satisfaction of record from the defendant, who had full notice of the execution and delivery of the instrument. The Court below denied a motion to set aside the satisfaction, and the Supreme Court refused a mandamus, upon the ground that a chose in action for a tort merely personal, is not assignable, so that a Court of law will protect the assignee against the subsequent fraudulent discharge of the damages recovered in a suit prosecuted for such tort, although the tort-feasor accept the discharge with full knowledge of the assignment. If, under our former practice, a suit had been brought against *Miller*, the warden, for false imprisonment, and *Armstrong* had executed to the now plaintiff a transfer of whatever damages could be recovered in the action, a Court of law, the only Court that had jurisdiction of the suit, would not protect the assignee against the acts and doings of *Armstrong* to his prejudice, because no right could pass by such instrument. As the party in interest must be the plaintiff, can such a right be maintained by the assignee? The party may call it an action for work and labor; but the Court will look at the substantial and controlling facts in the case, and not to the form of the allegations upon the record.

We, therefore, submit that the right of action, asserted by the plaintiff, originates in a tort, and that the attempted assignment of it will not enable him to maintain the action.

If *Patterson* had been concerned with *Miller* in the commission of the tort, and if the tort could be converted into a contract, the demurrer to the second defense was improperly sustained. The rights of the plaintiff and the liabilities of *Patterson* would then be such as arise upon contract, and the second defense alleging the acts of *Miller* in regard to said work and labor, shows the non-joinder of a co-contractor. That high degree of certainty, required in pleas of abatement, setting up the non-joinder of an omitted party, is no longer necessary. If the plea is correct in substance, but not in form, the remedy is not by demurrer, but by motion to have it made more certain and definite. Voorhies' (N. Y.) Code, § 144, and the authorities there cited. *Miller* being warden, the Court will take judicial notice that he continued in office up to the time of the institution of the suit. He was an officer of state. 1 R. S. p. 391.—1 Greenl. Ev., § 6.

The form of the demurrer was the same as in *Lane v. The State*, 7 Ind. R. 426.

(3) Mr. *Crawford's* brief was not found among the papers in the case.

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*A.* placed four hundred bushels of wheat in the mill of *B.*, upon the terms that the latter might mix it with his own, convert it into flour when he pleased, sell the flour, and appropriate the proceeds to his own use, but that, whenever *A.* saw fit, he had a right to exact from *B.* the same quantity in kind of wheat, or the amount of flour so much wheat would make, or the then price of wheat per bushel, in money. After the delivery of the wheat, but before *A.* had made a demand of *B.* for anything in return, the mill, and the wheat then in store in it, were consumed by fire.

*Held*, that the contract was one of sale, and not of bailment, and the loss must fall on *B.*

It was claimed by the defendant, in this case, that it was a custom at *Indianapolis*, that when a miller received wheat upon the terms above stated, it was at the risk of the seller till he called for his pay. *Held*, that such a custom could only be proved by showing that the *Indianapolis* millers had long been in the habit of thus receiving wheat, and losing it, or having it destroyed, and that the sellers did not claim pay for it.

Friday,  
May 27.

APPEAL from the *Marion* Court of Common Pleas.

PERKINS, J.—*Wallace* sued *Carlisle* for the value of wheat, which he had deposited in store with *Carlisle*, who was a miller. The plaintiff declared in assumpsit and trover, and in his reply he set up a claim for the destruction of the wheat by fire, by the carelessness of *Carlisle*. The Court overruled a demurrer to the complaint, for a misjoinder of causes of action, and held, also, that the reply was in conformity with the statute. The defendant, in his answer, set up a usage of trade, that when wheat was placed in store with a miller, without any further agreement, it remained at the risk of the depositor; and he might afterwards call for the same quantity of the same quality of wheat, or sell it to the miller, as they might agree.

The evidence is not upon the record, and the questions in this Court are raised only upon instructions given and refused.

As the evidence is not before us, we are unable to discover the precise facts of the case, and can with difficulty determine upon the accuracy of qualifications in instructions, as applied to the evidence.



It would seem from the record and arguments of counsel, that *Wallace* placed in the mill of *Carlisle* some four hundred bushels of wheat, upon the terms that the latter was at liberty to mix it with his own, convert it into flour when he pleased, sell the flour, and appropriate the proceeds to his own use; and, whenever *Wallace* saw fit, he had a right to exact from *Carlisle*, the same quantity in kind of wheat, or the amount of flour so much wheat would make, or the then price of wheat per bushel in money.

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After the delivery of the wheat, but before *Wallace* had made a demand of *Carlisle* for anything in return, the mill of the latter, and the wheat, then in store in it, were consumed by fire; and the question is, who is to bear the loss of the wheat?

It is necessary, in answering this inquiry, to first ascertain the character of the contract under which the wheat was delivered to *Carlisle*. Was it one of bailment, or of sale?

As neither the identical wheat, nor the flour made from it, was to be returned to *Wallace*, and the wheat was not to be kept separate, but to be mixed with that of *Carlisle*, and used by him when he pleased, the contract of delivery must be regarded, upon its terms, as one of sale and not of bailment. *Ewing v. French*, 1 Blackf. 353.—*Ashby v. West*, 3 Ind. R. 170.—*Pribble v. Kent*, 10 *id.* 325.—*Mason v. Beard*, 2 *id.* 505.—Ind. Dig., pp. 205, 725.

The contract being one of sale, the property, hence, being in *Carlisle*, the loss must fall on him, unless there are other elements entering into the case which may control it.

It is not claimed that there was any special stipulation between the parties that could have such effect. But it is claimed to have been a custom of trade at *Indianapolis*, that when millers received wheat upon the terms above stated, it was at the risk of the seller till he called for his pay.

It is very difficult to see how such a custom could be proved. It could not be proved by showing that it was the custom of millers to make such a stipulation a part of



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the contract; because that would make the question of liability one not of custom, but of special contract.

Such a custom could only be proved by showing that the *Indianapolis* millers had long been in the habit of thus receiving wheat and losing it, or having it destroyed, and that the sellers did not claim pay for it, in such cases—in short, that losses of wheat by millers, and exemption from liability to pay for it, had been so frequent, and for so long a time, as to have become the law of the place.

We are not called upon here to say that such a custom, if proved, would not be good, as, in the absence of the evidence, we cannot say that the instructions given in this case may not be correct when applied to that evidence; and the instructions refused we must presume correctly refused for want of such applicability.

It should be remarked that the record does state that there was "evidence offered to prove certain local customs, with a view to exemption from liability on the part of the defendant;" but this is too indefinite.

*Per Curiam.*—The judgment is affirmed with 1 per cent. damages and costs.

*L. Barbour* and *J. D. Howland*, for the appellant.

*H. C. Newcomb* and *J. S. Tarkington*, for the appellee.

#### MACK and Others v. GROVER.

Friday,  
May 27.

APPEAL from the *Decatur* Court of Common Pleas.

*Per Curiam.*—Suit by *Ira Grover* to foreclose a mortgage. *Mack* and others, junior mortgagees, applied to be made parties defendant, and were admitted. They insisted that the mortgage to *Grover* had been paid. They asked that mortgagees junior to themselves should be made parties by the plaintiff. They objected that the amount involved was beyond the jurisdiction of the Court of Common Pleas.



The questions raised in the case are—

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1. Whether junior mortgagees are necessary parties to a suit of a senior to foreclose.

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It seems that they are not. *Pattison v. Shaw*, 6 Ind. R. 377, and authorities there cited (1). They are proper, but not necessary parties.

2. Whether the mortgage in this case had been paid.

That was a question upon the evidence, and we see no ground to interfere with the decision of it below.

3. Whether, where several mortgagees are brought before the Court, each having a separate claim against the mortgagor, which, of itself, is within the jurisdiction of the Court, but the aggregate of all of which claims amounts to a sum beyond that jurisdiction, the jurisdiction of the Court is ousted.

We incline to think the jurisdiction is not ousted. We think the case may be assimilated to that of an attachment, where separate creditors file claims.

The judgment is affirmed with 1 per cent. damages and costs.

*J. S. Scobey* and *W. Cumbach*, for the appellants (2).

*B. W. Wilson*, for the appellee (3).

(1) See, also, 11 Ind. R. 398.

(2) Counsel for the appellants cited the following authorities :

1. Upon the question of parties. 2 R. S. p. 31, § 18.—7 Ind. R. 122.—*Minor v. The Mechanics' Bank*, 1 Pet. 46.—*Fletcher v. Mansur*, 5 Ind. R. 267.

2. Upon the question of jurisdiction. 2 R. S. p. 6, § 5.—R. S. 1838, p. 202, § 16.—*Payne v. Miller*, 6 Blackf. 178.—*Thurman v. Hammond*, 5 Blackf. 66.—*Tripp v. Elliott*, *id.* 168.—*Reed v. Sering*, 7 *id.* 135.—*Bogart v. The New Albany, &c.*, 1 Ind. R. 38.

In the course of their argument, counsel contended that *Egbert v. Rush*, 7 Ind. R. 706, overrules *Callins v. Evans*, 5 *id.* 441, and *McVicker v. Pratt*, *id.* 450.

(3) Mr. *Wilson*, *contra*, upon the question as to parties, cited 3 Johns. Ch. 457; Calvert on Parties, 128, *et seq.*; 7 Bac. Abr. 161, and cases cited; 6 Ind. R. 377; 8 Blackf. 165.

He contended that *Egbert v. Rush*, 7 Ind. R. 706, does not overrule any case, and cited 8 Ind. R. 378, and 9 *id.* 256, 257.



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1859.

PATTON v. HAMILTON.

PATTON  
v.  
HAMILTON.

Suit to recover damages for the breach of a contract. Answer, that the contract was obtained by fraud. Reply in denial. *Held*, that the defendant had the open and close.

The cross-examination of a witness should be confined to the subject-matter of the original examination. If a party wishes to examine his opponent's witness touching new matter, he must call him afterwards as his own witness.

A judgment will not be reversed for a failure to assess nominal damages.

Friday,  
May 27.

APPEAL from the *Decatur* Circuit Court.

PERKINS, J.—*Patton* sued *Hamilton* to recover damages for the breach of a contract.

Answer, that the contract was obtained by fraud.

Reply, in denial.

Jury trial; verdict and judgment for the defendant.

The Court gave the defendant the opening and closing of the case. This was right. The burden of the issue was upon him.

On the trial, the Court restricted the cross-examination of witnesses to the subject-matter of the original examination. This was right. If the party wished to examine his opponent's witnesses to new matter, he could do so by calling them afterwards as his own witnesses. *Wright v. Gaff*, 6 Ind. R. 417, on p. 420.

Errors are assigned upon the giving and refusing of instructions by the Court, and the refusing of a new trial. The evidence is of record.

The contract sued upon was for the conveyance, by a son, just turned of twenty-one years of age, of his father's farm, to the plaintiff. The father was living upon the farm, and had not authorized the son to sell it. The right by virtue of which the son assumed to make the sale was, that he expected the farm would fall to him at his father's death. The purchaser knew all these facts.

The issue made for trial by the pleadings, as we have seen, was one of fraud. Instructions should, therefore, have been relevant to that issue. But we shall not spend time in examining those in this case.

12	256
144	582
12	256
148	134
12	256
169	501



Upon the facts appearing in evidence, no jury would ever be impaneled that would give the plaintiff a verdict for, at all events, more than nominal damages. The evidence tends to show fraud and undue means, on the part of the plaintiff, in obtaining the contract from young *Hamilton*, and does not show any damage arising from the breach of it. This is sufficient, without searching for further grounds, to sustain the judgment below. A new trial will not be granted for a failure to assess nominal damages. Ind. Dig. 591.

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v.  
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*Per Curiam*.—The judgment is affirmed with costs.

*J. S. Scobey* and *W. Cumbback*, for the appellant.

*J. Ryman*, for the appellee.

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HUST v. CONN.

12	257
120	248
12	257
153	543

Under the code, a summons issued upon a præcipe, before the filing of the complaint in the cause, will be set aside on appearance and motion.

An attorney acting as *amicus curiæ* cannot take an exception.

Where the complaint does not show that the summons was prematurely issued, a demurrer based upon that defect is bad.

If the defendant appear and demur to the complaint, he will not afterwards be allowed to question the validity of the summons.

The Supreme Court will not review the action of an inferior Court, in granting a new trial, unless great injustice appears to have been done.

APPEAL from the *Pulaski* Court of Common Pleas. *Saturday, May 28.*

DAVISON, J.—*Hust* was the plaintiff, and *Conn* the defendant. The record shows that the plaintiff, on the 28th of *September*, 1855, filed in the clerk's office of said Court, a præcipe, in these words:

"*Jesse Conn v. James Hust.*

"The clerk will issue a summons in the above entitled cause, returnable on the second day of the term. Indorse suit brought to recover damages for trespass—damages claimed, 200 dollars. [Signed] *Carter and Hathaway*, attorneys for plaintiff."



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A summons was accordingly issued, and delivered to the sheriff, which was on the same day, viz., the 28th of *September*, served on the defendant, and so returned by the sheriff. After this, on the 29th of *September*, the plaintiff filed in said clerk's office, a complaint, wherein he charges the defendant with having broken and entered his (plaintiff's) close, whereby he was damaged 200 dollars. At the term of the Common Pleas next after the service of the summons, one *James W. Eldridge*, an attorney of the Court, as a friend of the Court, moved to set aside the summons and dismiss the suit, on the ground that the summons was issued before the filing of the complaint; but his motion was overruled, and he excepted. This ruling is assigned for error.

The code says: "A civil action shall be commenced by filing in the clerk's office a complaint, and causing a summons to issue thereon." 2 R. S. p. 35, § 31. This rule of practice seems to be imperative; and had the defendant appeared, and made a motion to set aside the summons, &c., and upon its denial, excepted to the opinion of the Court, the ruling would have been held erroneous. But we have decided that an attorney acting as *amicus curiæ* has no right to take an exception. *Campbell v. Swasey*, at the present term (1). It follows that the alleged error, founded upon the exception taken, is not available in this Court.

The motion of the attorney having been disposed of, the defendant appeared and demurred to the complaint, alleging for cause of demurrer, "that the Court had no jurisdiction of the subject or of the defendant, for the reason that the summons was issued prior to the filing of the complaint." The demurrer was overruled, and, we think, correctly. Whether the summons was or was not prematurely issued, does not appear in the complaint, and the statutory rule is, that a demurrer reaches such defects only, as appear on the face of the pleading. 2 R. S. p. 38, § 50. But the defendant having appeared and demurred to the complaint, cannot afterwards be allowed to question the validity of the summons.



Upon the overruling of the demurrer, the defendant answered; and issues being made, the cause was submitted to a jury, who found for the defendant. Motion for a new trial, on the alleged ground that the verdict was contrary to law, and unsustained by the evidence, which motion the Court sustained, and the defendant excepted. After this, at a subsequent term, there was a second trial of the cause, which resulted in a verdict for the plaintiff, upon which the Court, having refused a new trial, rendered judgment, &c. The action of the Court, in sustaining the plaintiff's motion for a new trial, is alleged to be erroneous. An appellate Court will always more readily control the discretion of the Court below, in refusing a new trial, than in granting it; because the refusal operates as a final adjudication of the rights of the parties. Indeed, we have ruled, that the granting of a new trial by the Circuit Court, is a question of sound discretion, which will not be disturbed in this Court, unless a very plain case of injustice is made to appear. *Nagle v. Hornberger*, 6 Ind. R. 69. In the case before us, we have carefully examined the evidence in relation to which the Common Pleas sustained the plaintiff's motion, and are decidedly of opinion that that Court, in granting the new trial, acted properly within the scope of a sound discretion. *Powell v. Grimes*, 8 Ind. R. 252.—*Leppar v. Enderton*, 9 *id.* 353.—10 *id.* 485.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*D. D. Pratt*, for the appellant.

(1) *Ante*, 70.

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v.  
TILTON.

### RUFFING and Another v. TILTON and Others.

An assignment of error in this—that judgment was rendered for the appellee when it ought to have been rendered for the appellant—amounts to nothing.

12	250
136	600
12	250
140	545
143	300
12	250
148	50
150	307
12	250
150	78



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**v.**  
**TILTON.**

If, under any supposable state of the evidence, instructions given would have been correct, it will be presumed, the record not showing the contrary, that such evidence did exist.

In the absence of the evidence, it will be presumed that the action of the Court, in refusing instructions, was correct.

Although the claims of judgment-creditors be several, they may unite in a suit to set aside a fraudulent conveyance, and subject the property to the payment of their judgments. At least, the defendant cannot complain of the joinder.

There is no error in permitting a discussion before the Court, in the presence of the jury, touching the proper form of their verdict.

The jury have a right to find a special verdict, unless otherwise directed by the Court.

A conveyance executed with the intent to defraud creditors, is not rendered valid by the circumstance that it was executed upon an adequate consideration.

If a conveyance be made colorably with intent to defraud existing creditors, it may be avoided by subsequent creditors.

Saturday,  
May 28.

**APPEAL** from the *Carroll* Circuit Court.

**WORDEN, J.**—Complaint by *Tilton* and *Malony* against *Charles* and *John N. Ruffing*, to set aside a conveyance of certain real estate, made by *Charles* to *John N. Ruffing*, on the ground that the conveyance was made to defraud the creditors of said *Charles*, the plaintiffs being such creditors, and having judgment against him. *Margaret Ruffing*, formerly wife of *Charles*, on her petition setting up a divorce from said *Charles*, and a decree against him for alimony, was made a party plaintiff, asking that the conveyance be set aside and her alimony made out of the premises.

There was a default as to *Charles*, but *John N.* appeared and answered. Issues were made up, and the cause tried by a jury, which resulted in a verdict and judgment for the plaintiffs, over a motion for a new trial.

Exception was taken to several rulings of the Court on demurrers, but no error is assigned upon these rulings.

The errors assigned are as follows, viz.:

1. "Judgment was rendered for the appellees when it ought to have been rendered for the appellants.

2. "The Court erred in giving the instructions asked for by the appellees, and in refusing instructions asked for by the appellants.



3. "The Court erred in refusing a new trial for the causes assigned."

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The first assignment is too general, and amounts to nothing. *Kimball v. Sloss*, 7 Ind. R. 589.—*King v. Wilkins*, 10 *id.* 216.

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The evidence is not set out, and, therefore, we must presume that the instructions refused were inapplicable to the facts proven, and were therefore refused, if correct in the abstract. *Woolley v. The State*, 8 Ind. R. 502.

The instructions given, if not all entirely correct, are so in the main, and some of them are very clearly so. We cannot say that any of them are wrong under any supposable state of facts that might have been shown.

It is well settled that if, under any supposable state of the evidence, the instructions given could have been correct, it will be presumed, the record not showing the contrary, that that state did exist. Ind. Dig., p. 684, § 430. Some of the instructions asked were refused as asked, but given as modified by the Court. In the absence of the testimony, we presume the instructions, as asked, were properly refused.

The last error assigned relates to the ruling of the Court on the motion for a new trial.

The following are the reasons for which a new trial was asked, viz.:

1. "The Court erred in permitting the said *Margaret Ruffing* to be made a co-plaintiff.

2. "The verdict is contrary to law and the evidence in the case.

3. "The Court erred in refusing to give the instructions asked for by the defendant, as asked for, which were refused.

4. "The Court erred in giving the instructions asked for by plaintiff.

5. "The verdict of the jury is contrary to the instructions of the Court and the evidence in the cause.

6. "The Court erred in permitting an argument, by the counsel for the plaintiff to the Court, as to the form of the verdict, in presence of the jury, after they had been returned



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into Court and polled, and some of them had dissented from the verdict.

7. "Because the jury did not find whether the deed of conveyance from *Charles Ruffing* to *John N. Ruffing*, for the premises referred to in the complaint was a *bona fide* deed, executed for a valuable and fair consideration."

The first reason for a new trial, we think, is insufficient, even on the supposition that a motion for a new trial was the remedy for the supposed error. Although the claims of the plaintiffs, *Tilton* and *Malony*, and *Margaret Ruffing*, were several and not joint, yet they were judgment creditors, and had a right to unite in a suit to set aside the fraudulent conveyance, and subject the property to the payment of their judgments. *Kipper v. Glancey*, 2 Blackf. 356. At least, the defendants had no right to complain of her being made a party plaintiff. The other plaintiffs, if any one, were the persons injured by her coming in as a party, and they do not complain.

The second reason we will consider in connection with the seventh.

What we have said already, disposes of the third and fourth. The evidence not being before us, we have no means of determining whether there is anything in the fifth; but we must presume that the verdict is in accordance with the instructions of the Court, and the evidence in the cause.

The sixth reason for a new trial grows out of the following facts, as appears by the record. The jury returned into Court with a verdict, and upon being polled, some of them dissented from it. This verdict was not received. Thereupon, the Court permitted counsel for the plaintiffs to address the Court in the presence of the jury, as to the form of the verdict, to which exception was taken. Thereupon, the jury, after receiving additional instructions as to the form of their verdict, retired, and afterwards returned into Court with the verdict contained in the record, and, upon being polled, all assented thereto.

We are unable to perceive any error in permitting a discussion before the Court in the presence of the jury, as to



the proper form of their verdict. Such discussion, certainly, would not necessarily prejudice the substantial rights of the parties, and if any injury has resulted in this case, it is not shown. This point is abandoned by counsel, as it is not discussed by them, in their brief.

There was no general verdict found by the jury, but they returned the following special verdict in response to interrogatories put to them, viz.:

"The jury find that *Charles Ruffing* conveyed said premises to the said *John N. Ruffing*, for the purpose of defrauding his creditors; that said *John N. Ruffing* had knowledge of the fraudulent intentions of said *Charles Ruffing*; and that *John N. Ruffing* is still in possession of the premises alleged to have been thus fraudulently conveyed to him by said *Charles*.

"The jury find that said *Charles* did, at the time of making said deed, intend to abandon his wife; and that he executed said deed for the purpose of defrauding his wife out of her alimony; and the jury further find, that the said *John N. Ruffing* did make promises to the said *Margaret Ruffing* to procure her signature to the deed, without which promises, she would not have signed the deed.

"The jury find that said *Charles* afterwards abandoned his said wife, *Margaret Ruffing*, in pursuance of his intention at the time of the execution of the deed of conveyance by himself to *John N. Ruffing*; that *Margaret* afterwards obtained, in the *Carroll* Circuit Court, a decree of divorce, and for alimony, against said *Charles*, and upon her application, in consequence of such abandonment.

"The jury find that plaintiffs, *Tilton* and *Malony*, obtained judgment in the *Carroll* Circuit Court, against said *Charles*, on their debt against him for the sum of 368 dollars, 44 cents, on the 28th of *August*, 1852; that *Margaret* obtained her decree against *Charles* for alimony, to the amount of 600 dollars, on the 8th of *May*, 1854; and that at the commencement of the suit, said *Charles* had no other property out of which plaintiff's claim could be made."

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Is this verdict contrary to law, as specified in the second reason for a new trial? or is it bad because the jury did not find whether the deed of conveyance from *Charles Ruffing* for the premises, &c., was a *bona fide* deed, executed for a valuable and fair consideration, as specified in the seventh reason for a new trial.

The verdict is a special one, by which the jury found the facts only, leaving the judgment thereon to the Court. Such a verdict, the jury had a right to find, unless otherwise directed by the Court. 2 R. S. p. 114, § 336.

It is objected that the special verdict does not authorize the judgment in favor of *Margaret Ruffing*, because it does not find sufficient for that purpose. It finds that the property was conveyed by said *Charles*, for the purpose of defrauding his creditors, and that *John N.* had knowledge of such fraudulent intent. It also finds that at the time of executing the conveyance, said *Charles* intended to abandon his wife, and executed the deed for the purpose of defrauding her of her alimony; but it does not find that *John N.* had any knowledge of the latter contemplated fraud. This, it is insisted, is not sufficient to authorize a judgment in favor of *Margaret*, in the absence of any finding upon the question whether the deed was executed for a valuable and fair consideration.

A conveyance executed with the intent to defraud creditors, is not rendered valid by the circumstance that it was executed upon an adequate consideration. *Rogers v. Evans*, 3 Ind. R. 574.

*Margaret*, at the time of the execution of the conveyance, could not, perhaps, be considered a creditor; but it is said to be clear, that if a conveyance be made colorably with intent to defraud any existing creditor or creditors, it may be avoided by subsequent creditors; in other words, that evidence of collusion against existing creditors is sufficient evidence of fraud against subsequent creditors. 1 Am. Lead. Cases, 71, and authorities there cited.

*Margaret* became a creditor when she obtained her decree for alimony; and according to the above authority, she would have been entitled to have the conveyance set



aside, although there had been no finding that it was made with an intent to defraud her.

Here, the jury have found the fraudulent collusion between *Charles* and *John N.*, to defraud creditors then existing, and that is sufficient evidence against *John N.*, to fix upon him a knowledge of the fraudulent intent of said *Charles* in respect to said *Margaret*. When he purchased, *John N.* was apprised that the designs of his grantor were fraudulent, and having such knowledge, he participated in the fraud by taking a conveyance of the property, and he cannot be permitted to say that he was not apprised of the full extent of his vendor's fraudulent designs. In this view of the case it is wholly immaterial whether the conveyance was voluntary, or made upon an adequate consideration.

We think the verdict was sufficient to authorize the judgment in favor of *Margaret Ruffing* as well as the other plaintiffs in the case.

But it is objected, that as *Margaret* joined in the deed of conveyance with *Charles*, knowing the same to have been made with intent to defraud creditors, she cannot now be permitted to take advantage of her own wrong, and ask the conveyance to be set aside for her own benefit.

In answer to this, it may be remarked that it nowhere appears that *Margaret*, at the time of the execution of the conveyance, was apprised of the fraudulent intent of her said husband. In her petition to be made plaintiff in the case, she alleges the conveyance to have been fraudulent; but no just interpretation of the language employed leads to the conclusion that she was cognizant of that fact at the time the conveyance was executed.

We have examined all the errors assigned, and are of opinion that none of them is sufficient to reverse the judgment. Some other points are made in the brief of counsel, but not being assigned for error, we have not examined them.

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*Per Curiam*.—The judgment is affirmed with 3 per cent damages and costs.

*J. F. Suit and J. M. Cowan*, for the appellants.

*S. A. Huff, Z. Baird, J. M. La Rue, and Sims and Sims*, for the appellees.

### MARTIN v. WYNCOOP and Others.

An administrator is a trustee of the real as well as the personal estate of his decedent; and as such, he cannot purchase such real estate at a sheriff's sale, for himself or for another, even though it be sold on an execution in his favor levied before he assumed the trust, and although it may appear that he used efforts to make the property sell for the best price possible.

And the *cestui que trust* may have such a sale set aside, without showing fraud, or that the administrator made an advantageous bargain.

Saturday,  
May 28.

APPEAL from the *Marion* Circuit Court.

WORDEN, J.—*Daniel B. Fatout* filed his bill in chancery (under the old practice) against the heirs of *Austin W. Morris*, the heirs of *Eben Pierce*, deceased, and the appellant, *Martin*, to remove a cloud from the title to certain lands which *Morris* had, in his lifetime, sold to *Fatout*. The heirs of *Pierce* (*Wyncoop et al.*) filed a counterclaim or cross-bill against all the other parties, and set up a claim to a tract of land which *Morris* had sold to *Martin*. The heirs of *Pierce* allege that the sale of the land by *Morris* to *Martin* was in violation of the trust reposed in *Morris*, as administrator of the estate of *Pierce*. The correctness of the ruling of the Court in reference to the piece of land last mentioned is the only point before us.

The facts, so far as it is necessary to state them in order to an understanding of the question presented, are as follows, viz.:

*Pierce*, in his lifetime, was the owner of the land in controversy. *Morris* held certain judgments against *Pierce*,



on which executions had been issued and levied upon the lands in the lifetime of *Pierce*; and while the lands were thus held by the levy, *Pierce* died, but writs of *venditioni exponas* issued, on which the land was finally sold. Before the land was sold, *Morris* was appointed administrator of *Pierce's* estate. On the sale of the lands, *Morris* became the purchaser, received the sheriff's deed, and afterwards conveyed the land to *Martin* for the same amount he had bid at the sale. *Martin* had notice that *Morris* was the administrator of the estate at the time he bought the land at the sheriff's sale. There is testimony having a tendency to show that *Morris* bid off the land for *Martin*, and there is no proof of any actual fraud or unfairness in the sale, but on the contrary, *Morris* appears to have tried to induce competition, and wished, as the witness says, to have it sell for the highest price. *Martin* has made lasting and valuable improvements on the premises, to the value of 100 dollars.

The Court below, having found substantially the foregoing facts, ordered the conveyances from the sheriff to *Morris*, and from *Morris* to *Martin*, to be set aside, on the following terms and conditions, viz.: The property was ordered to be again offered for sale at a sum equal to *Morris's* bid with the interest thereon, and the improvements made on the premises by *Martin*, amounting to 1,479 dollars, 27 cents, to which were to be added the costs of the suit, and the costs of the sale to be made under the order, the total of which was to be the least sum for which the premises were to be offered; and if the premises failed to sell for more than that sum, the sale aforesaid and conveyance were to be in all things confirmed; but if the land should sell for more, the money was to be brought into Court, to be distributed as might thereafter be ordered.

*Martin* appeals from the order of the Court, and assigns several errors; but as no question is alluded to in the brief of counsel, except as to whether the facts warranted such an order, we of course shall not examine any other question.

It is claimed that this case does not fall within the prin-

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ciple that excludes a trustee from purchasing, for his own benefit, the property embraced in the trust.

If the principle extended to no other sales than those made by the trustee himself, whether under an order of Court or otherwise, where his character of vendor and purchaser, at the same time, would be utterly inconsistent—his duty as vendor being to sell the property for the highest price that could be obtained, and his interest as purchaser to get it for the lowest—the case would clearly be with the appellant, as he, or rather his vendor, did not purchase at his own sale, but at a judicial sale made by the sheriff.

But the principle is broader in its application, and extends to all sales of the trust property, whether made by the trustee himself under his powers as trustee, or under an adverse proceeding. As a general trustee of the subject, it is his duty to make it bring as much as possible, at any sale that may take place; and, therefore, he cannot put himself in a situation where it becomes his interest that the property should bring the least sum.

Thus, in *Campbell v. Johnson*, 1 Sandf. 148, the testator appointed two persons his executors, and the guardians of his children, and devised all his estate to them in trust, to sell for the benefit of his heirs. The land was subject to mortgages given by the testator, and under one of them it was sold, and one of the executors purchased. The Court held that the sale must be set aside on the application of the heirs, upon the ground that in both capacities, as trustees to sell, and guardians of the children, the executors had a duty to perform in regard to the property, which rendered it inequitable for either of them to become a purchaser. See, also, *Bell v. Webb*, 2 Gill, 164; *Evertson v. Tappen*, 5 Johns. Ch. 498; *Toney v. The Bank of Orleans*, 9 Paige, 650; *Van Epps v. Van Epps*, *id.* 238.

The fact that the land was bid off for *Martin* by *Morris*, if such be the fact, cannot alter the case, for the principle extends to purchases by the trustee for another. *Brackenridge v. Holland*, 2 Blackf. 377.—*Ex parte Bennett*, 10 Ves. 381. See, also, *Gregory v. Gregory*, Coop. 204.



In order that the *cestui que trust* may have such sale set aside at his option, it is not necessary that he should show fraud, or that the trustee has made an advantageous bargain. Judge STORY says: "The principle applies, however innocent the purchase may be in a given case. \* \* The *cestui que trust* is not bound to prove, nor is the Court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come in at his option, and, without showing essential injury, to insist upon having the experiment of another sale." 1 Story's Eq. Juris., § 322.

The case of *Fox v. Mackreth*, 2 Bro. Ch. 400, and *Davoue v. Fanning*, 2 Johns. Ch. 252, may be cited as leading cases on this subject.

But it is claimed that as *Morris* had, in the lifetime of *Pierce*, levied upon the land, whereby he might, without reviving his judgments, proceed to sell on a *venditioni exponas*, and purchase in the land on such sale, his rights in that respect are not at all affected by his taking out letters of administration on the estate.

We think the foregoing authorities establish the proposition that a trustee cannot, as a general rule, purchase the trust property, either at his own, or any other sale thereof, and that the principle applies to this case, if the real estate of a decedent is to be considered trust property within the meaning of the rule, and if the rule applies to a sale on execution in favor of the trustee.

There is much plausibility in the proposition that the real estate of a decedent is not within the trust committed to an administrator, unless he proceeds, in the statutory mode, to make it assets for the payment of debts. The personal estate is the primary fund out of which debts are to be paid, and the administrator has nothing to do with the real estate, unless, for the want of sufficient personalty,

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May Term, 1859. it become necessary to convert it into assets. It descends immediately to the heir, or goes to the devisee, subject only to the rights of creditors.

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There is an authority, however, that settles both of the points above suggested against the purchaser. *Rodgers v. Rodgers*, Hop. 515.

In this case, an executor had purchased the lands of the testator on a judgment of his own against the testator.

The chancellor, after stating the case, proceeds as follows :

“ When *Halsey Rodgers* assumed the office of executor, he took upon himself all the duties of that trust, and he voluntarily became a trustee of all persons interested in the estate of *Thomas Rodgers*. \* \* \* In this situation, *Halsey Rodgers* was both debtor and creditor. He was debtor, as executor, to all the creditors of *Thomas Rodgers*; he was himself a creditor by the judgment, and he was thus, in respect to his own demand upon the judgment, debtor as executor, and creditor in his own right. If the personal estate of *Thomas Rodgers* had been sufficient to pay his debts, it would have been the duty of *Halsey Rodgers*, as executor, to pay the debt to himself from the personal fund. He could not have been allowed, in the exercise of his right as creditor by judgment, to levy the debt to himself from the lands of the testator, while it was his duty as executor to discharge the debt from the personal estate. Such an exercise of his right as creditor would have been subversive of his duty as executor; and it is clear, that in such a case, his right as a creditor must have yielded to the duties of the trust which he had assumed. \* \* In this case, it is said that *Halsey Rodgers*, though a trustee of the personal estate of the testator, is not a trustee of the lands. The personal estate being insufficient to pay the debts of the testator, it was necessary that the lands, or some of them, should be sold for the satisfaction of the creditors. All persons interested in the lands were, therefore, interested that the personal effects should be fully applied to the payment of debts. It was the duty of the executor to apply the personal estate in



payment of debts; and next, and equally, it was his duty to resort to the lands, in the manner prescribed by law, to raise a sum sufficient to pay the debts which might remain unpaid from the personal fund. When the personal fund is deficient, and there are lands of the deceased debtor, the executor or administrator is bound to apply to the surrogate for an order to sell the lands. Such an application is, by our statute, made the absolute duty of an executor or administrator; and by this simple and excellent method, all the creditors of a deceased debtor may obtain satisfaction from his real estate, without litigation or any hostile proceeding. The executor or administrator is, by our law, made the agent for this object. It is his duty to institute such proceeding, and prosecute it to effect, and this measure is often the most important duty of his office. In this case, the personal estate of *Thomas Rodgers* was the primary subject of the trust of this executor; and the land being the secondary fund for the payment of debts, was the secondary subject of the trust. This executor was the trustee for the payment of debts from both funds; and his trust embraced an administration not only of the personal estate, but also of the lands so far as the lands were necessary for the payment of debts. As executor, he had no estate in the lands; but as executor, he had a power over the lands, and a duty concerning them, which, for every purpose of justice, constituted a trust, and him a trustee, of those lands. Being thus, in substance, a trustee of the lands, he was bound so to administer them and apply them to the payment of debts, that he should not gain, and those interested should not lose, by his acts; and as a trustee, he is subject to the principle of equity which gives to those who are beneficially interested, the option to affirm or reject the purchase thus made by the trustee. \* \* \* If *Halsey Rodgers* had not accepted the trust of executor, he would have been at full liberty to pursue all his remedies for the satisfaction of his judgment. \* \* \* But when he accepted a trust which imposed on him the duty of taking every legal and prudent measure to pay the

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debts of *Thomas Rodgers* from the personal and real estate, he was no longer at liberty to exert his rights as creditor in opposition to his duties as executor. He continued a creditor, but he relinquished any right of a creditor which might interfere with his duty as trustee. So far as the rights of *Halsey Rodgers* as a creditor, and his duties as a trustee, were in conflict with each other, his rights yielded to his duties."

The property had been sold for less than its value, but the entire reasoning of the Court shows that the same result would have followed had it been otherwise. The sale was set aside, and on appeal to the Court of errors, the decree of the chancellor was affirmed. 3 Wend. 504.

On appeal, it was said by SAVAGE, C. J., "There is no evidence of any actual fraud in the sale, but the propriety or impropriety of such a sale must depend upon the general question, whether a trustee can be permitted, under any circumstances, to sell the trust property, and become a purchaser at such sale." After citing the case of *Davoue v. Fanning*, *supra*, he holds that the principle is applicable to the case then before the Court, holding the executor a trustee of the real estate, and remarking that, "had the appellant declined the character of executor, he might have pursued his remedy under his judgment and execution; but he should not be permitted, as creditor, to sacrifice, for his own benefit, that very property which his duty, as executor, required him to protect and to dispose of to the best advantage of those entitled to the estate."

We have been thus liberal in quoting the remarks of the Court, because the case is directly in point, and the reasoning of the Court, in all essential particulars, is applicable to the case at bar. We are inclined to follow the *New York* doctrine, and hold that the purchase by *Morris*, under the circumstances, should be set aside on the terms, and in the manner, specified in the order made below. We are not clear that the costs of the suit and of making the sale ordered, should have been included in the sum at which the property was to be reoffered; but upon this



point we make no decision, as the appellant cannot complain of that, even if it were wrong, for it was for his benefit.

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*Per Curiam.*—The judgment is affirmed with costs.

*L. Barbour and A. G. Porter*, for the appellant.

### BOYLE v. GUYSINGER.

Where the plaintiff's covenant or stipulation constitutes only a part of the consideration of the defendant's contract, and the defendant has actually received a partial benefit, and the breach on the part of the plaintiff might be compensated in damages, an action may be supported against the defendant, without averring performance by the plaintiff.

Where a party, before the time fixed for the performance of an agreement, disables himself to perform it on his part, no demand of performance is necessary.

APPEAL from the *Henry* Court of Common Pleas.

Saturday,  
May 28.

PERKINS, J.—Suit upon the following contract:

"Sold to *John S. Guysinger*, two hundred head of well corn-fatted hogs, all spayed, and altered, weighing two hundred pounds, net, delivered between the 10th of *November*, 1855, and the 1st of *December*, 1855, at the option of *Guysinger*, delivered and weighed on the farm of *J. S. Guysinger*, in *Henry* township, *Henry* county; for which *Guysinger* agrees to pay to *Patrick J. F. Boyle*, 4 dollars per hundred pounds, net, in bankable funds; 200 dollars to be paid by the first of *August*, 1855, without interest; this article to be binding on our executors and administrators. *December* 23, 1854. [Signed] *P. J. F. Boyle*,

*John S. Guysinger.*"

On the 28th of *April*, 1855, *Guysinger* paid *Boyle* 150 dollars of the 200 dollars due the 1st of *August* following; and on the 2d of *August*, 1855, tendered the remaining 50 dollars. *Boyle* refused to receive it, because tendered a



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day too late, but did not return, or offer to return, the 150 dollars he had received.

In *November, 1855*, *Guysinger* demanded the hogs and offered to pay the stipulated price for them. *Boyle* refused to deliver them—said he never would deliver them—that the hogs were already in *Cincinnati, Ohio*.

The plaintiff recovered.

The simple statement of two well established principles will be all that need be said in this case.

1. Where the plaintiff's covenant or stipulation constitutes only a part of the consideration of the defendant's contract, and the defendant has actually received a partial benefit, and the breach on the part of the plaintiff might be compensated in damages, an action may be supported against the defendant without averring performance by the plaintiff. 1 Chit. Pl. 323.—Ind. Dig. 297.—Chit. on Cont. 737.—*Pickens v. Bozell*, 11 Ind. R. 275.

2. Where a party, before the time fixed for the performance of an agreement, disables himself to perform it on his part, no demand of performance is necessary. Ind. Dig. 787.—Chit. on Cont. 738.

*Per Curiam*.—The judgment is affirmed with 7 per cent. damages and costs.

*O. P. Morton* and *E. B. Martindale*, for the appellant.

*J. H. Mellett* and *W. Grose*, for the appellee.

12	274
133	263
12	274
138	240
12	274
138	253

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#### JONES v. JULIAN.

Suit upon a promissory note. The plaintiff assigned the note *pendens lite*, and moved to have the assignee substituted as plaintiff. The Court refused. *Held*, that this was matter of discretion.

Upon the trial of this cause, it appeared that a written contract which was set up in defense had been altered; but both the parties conceded the alteration, and the questions of value and damages were examined and decided upon it as originally executed. *Held*, that evidence touching conversations as to who had made the alteration was irrelevant.

A verdict is good if the Court can understand it, though it be informal; and



if it be so uncertain that the Court cannot understand it, the jury must be sent back with proper instructions as to the mode of framing it.

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Saturday,  
May 28.

APPEAL from the *Wayne* Court of Common Pleas.

PERKINS, J.—Suit by *Jones* against *Julian*, on a promissory note. Answer by way of counter-claim, setting up that the note was given for work done upon a special contract; that the work was not done according to the contract; that damages resulted, for which, it was claimed, the plaintiff was answerable to the defendant.

Replication in denial. Trial. Judgment for the defendant for eleven cents and costs.

During the progress of the cause, the plaintiff alleged that he had assigned the note, *pendente lite*, to one *Lewis Jones*, and moved the Court that he be substituted as plaintiff. The Court refused the motion.

This was matter in the discretion of the Court. *Dearmond v. Dearmond*, 10 Ind. R. 191.—*Hubler v. Pullen*, 9 *id.* 273.—*Harvey v. Myer*, *id.* 391.

On the trial it appeared that the written contract under which the work, for which the note was given, was performed, had been altered after its execution, but it did not appear by whom. The alteration was conceded by both parties, and the questions of value and damages were examined and decided upon the instrument, as originally executed between the parties.

Evidence was given and rejected touching conversations as to who made the unauthorized alteration; and points are made upon the rulings of the Court as to such evidence; but we are unable to perceive the importance of such evidence, whether given or rejected, in the decision of this cause. It seems that it must have been entirely irrelevant, and without any bearing upon the issue tried. Upon some issues which might be raised in cases, such evidence would, perhaps, be relevant.

The verdict of the jury is objected to. The jury found for the defendant, and assessed his damages at eleven cents. The verdict was informal; but it could be understood. Its legal effect was, that the jury found that the damages to



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the defendant, by the breach of the contract, were eleven cents greater than the amount of the note sued on, which was for a part only of the contract price of the whole work.

If the verdict had been so uncertain in its phraseology that the Court could not understand it, the jury should have been sent back with proper instructions as to the mode of framing it.

*Per Curiam*.—The judgment is affirmed with costs.

*M. Wilson* and *N. H. Johnson*, for the appellant.

*G. W. Julian*, for the appellee.

#### THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL v. HUSTON.

An objection to the rendition of judgment upon a report of referees, not based upon anything before the Court, may be disregarded.

If referees err upon any question of practice during the hearing, objection must be made then and there, and incorporated in either a bill of exceptions or a statement of the referees in their report.

Referees may be required to report the facts found; but that requirement does not extend to the evidence by which those facts are proved; and it is ground for rejecting the report, if they report the evidence instead of the facts proved. The rule as to special verdicts applies to special reports of referees.

Monday,  
May 30.

APPEAL from the *Hendricks* Circuit Court.

PERKINS, J.—Suit by *Huston* against the trustees of the *Wabash* and *Erie* canal, to recover for work and labor.

Answer by the defendants.

Reply by the plaintiff.

And thereupon, by agreement of the parties, the matters in controversy in the suit were referred to the decision of *Samuel B. Gookins* and *Samuel C. Willson*, the latter selected by the plaintiff, and the former by the defendants; or, in the event of the refusal of said *Gookins* to serve, then to *Elisha M. Huntington* in his stead, and in the event of



said *Willson* refusing to serve, then to *William M. Franklin* in his stead; and, in case of the disagreement of the aforesaid referees, says the entry of reference, they shall have the power to select a third, to whom said matters of difference shall be submitted, and who, in said event, shall aid jointly with them in making the report herein; and it is ordered, in the entry of reference, that said matters in controversy be referred as aforesaid, and that said referees meet at *Highland*, in *Clay* county, on *Wednesday*, the 28th instant, to hear the testimony and decide upon said matters; that they sit from day to day until the same is closed, and that they, or a majority of them, in case they select a third, report their decision to this Court at the next term, together with the facts found, and the conclusions of law separately, and this cause is continued till the next term, and said plaintiff has leave of Court to withdraw all the papers herein for the use of said referees.

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At the next term, the referees filed their report as follows:

"We, *Samuel C. Willson* and *Samuel B. Gookins*, to whom was referred certain matters of controversy pending in the Circuit Court of the county of *Hendricks*, in the state of *Indiana*, between *William R. Huston*, plaintiff, and the board of trustees of the *Wabash* and *Erie* canal, defendants, having taken upon ourselves the burthen of said reference, and having heard the evidence of the parties and the arguments of counsel, do make this report upon the law and facts to us submitted, in manner following, to-wit:

"We find that the parties entered into a contract in writing, as set forth in the complaint, for clearing off the timber by the plaintiff from the *Birch Creek* reservoir of the defendants, a copy of which is annexed to the complaint; that the said contract was entered into fairly by both parties, and that the evidence does not show any fraud or mistake in the making of said contract, which requires it to be reformed.

"We find, from the evidence, that the plaintiff entered in due time upon the work mentioned in said contract;



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that he prosecuted the same with reasonable diligence, and that he performed two-thirds of the work stipulated to be done, and that it was done in the manner directed by the defendants' engineers.

"We find that the plaintiff was entitled, by the terms of the contract, to be paid for the work so done at the rate of 15 dollars per acre, and all the timber upon the land to be cleared.

"We find that the land to be cleared amounted to six hundred and ninety-five acres, and that the plaintiff was and is entitled to receive therefor in money, the sum of 10 dollars per acre.

"We find that the timber upon said land, to which the plaintiff was entitled, was of the value of 9 dollars per acre, amounting to the sum of 6,255 dollars.

"We find that the defendants caused or permitted the land which was to have been cleared, to be overflowed with water, by closing the gates, or permitting them to be and to remain closed, by which, if they had been left open, the water would have passed off, and the said land to have been cleared would not have been overflowed; that this occurred about the 1st day of *December*, 1854, and that, in consequence of such overflow, the plaintiff was forced to abandon his work and the timber to which he was entitled; and that, if said land had not been so overflowed, the plaintiff would have had a reasonable time in which to complete the work, and secure the timber before the 1st day of *February*, 1855.

"We find the price of the work done, and the value of the timber, to be 13,205 dollars; that there has been paid to the plaintiff the sum of 7,120 dollars; and that there remains due from the defendants to the plaintiff the sum of 6,085 dollars, which sum, with the costs of this suit which have not heretofore been ordered to be paid by either party, we report to be paid by the defendants to the plaintiff.

"We find that on the 14th day of *June*, 1855, *William J. Ball*, the engineer named in the contract, made a final estimate, in which he estimated the work done by the plaintiff at 6,130 dollars.



"Upon the questions of law arising on the foregoing facts, we are of opinion that the contract must, so far as it can be followed, determine the measure of compensation. The value of the labor, according to the testimony of witnesses, is much greater than we have allowed; but we have not been governed by the testimony except in respect to the quantity of work done, and the value of the timber, the latter not being fixed by the contract. We have, therefore, taken the proportion of the price per acre of the work done, and the value of the timber, as the measure of damages.

"The contract provides that the value of the work done under it should be determined by the estimate of the engineer; but whatever might have been the effect of that stipulation, if the work had been completed by the plaintiff, or left unperformed by his default, we are of the opinion that the defendants cannot claim the benefit of it when its completion has been prevented by their acts.

"It is insisted by the defendants that the grounds were submerged by the rains that fell upon them, and a flood in *Birch Creek*, the waters being detained by the dam, and closing of the gates; and that it was the duty of the defendants, under the law, to detain the waters to supply the canal for purposes of navigation, and that the plaintiff entered into the contract with full knowledge of this legal obligation.

"It is manifest that but for the closing of the gates, there was no such quantity of water as would have put a stop to the work. That event, therefore, must be referred to the closing of the gates. No doubt the law requires the trustees, so far as they have the means, to furnish the canal with water for purposes of navigation; but this general provision of law cannot be allowed to control, or authorize the breach of a positive contract.

"It is urged that there is not sufficient evidence that the gates were closed by the defendants' orders. There is, at least, abundant evidence that they were closed and kept closed with their consent and approval. In our opinion, they were as much bound to furnish the plaintiff with a

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clear field for his operations as one would be who had contracted with a mechanic to build a house, to furnish an eligible site for it. The nature of the work negatives the idea that it could be done under water. The plaintiff had no control of the gates. He was helpless in the premises; and if the defendants deemed it necessary to close them, we think they are bound to respond to the plaintiff for the injury he has sustained thereby.

S. C. Willson,  
S. B. Gookins."

"January 22, 1858.

This report was duly returned to the Court and filed.

The defendants appeared and filed thirteen causes why judgment should not be rendered upon the report. A part of them related to the action of the referees at the hearing, in regard to the admission and rejection of evidence, and to their conclusions as to what the evidence proved.

These objections were not based upon anything before the Court, and were properly disregarded. No exception was taken on the trial before the referees. If they erred upon any question of practice during the hearing, the party should have objected then and there, and had the objection incorporated, either by bill of exceptions, or statement of the referees, in their report. This is the plain import of the statute, and is held to be the proper practice in *New York*. Voorh. Supp. 167. The code declares that "the trial by referees is conducted in the same manner as a trial by the Court." 2 R. S. p. 116, § 350. They may be required to report the facts found, and were thus required in this case. But that requirement does not extend to the evidence by which the facts found are proved; and it would have been ground for rejecting their report, if they had reported the evidence instead of the facts which it proved. This is the rule as to special verdicts and special findings by the Court. *Sisson v. Barrett*, 2 Comst. 406. The rule is the same as to special reports of referees. The statute, *supra*, and *Johnson v. Whitlock*, 3 Kern. 344.

The exceptions to the report based upon the application of the law to the facts found, were, we think, correctly overruled.



*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

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HANNA, J., absent.

R. W. Thompson, for the board.

J. M. Hanna, for the appellee (1).

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(1) Judge Hanna submitted the following argument :

The referees were not required to report the evidence, but only the facts they found from that evidence. Notwithstanding this, the 1st, 2d, and 8th specifications, in the exceptions, are based upon questions connected with the evidence, which could not be determined unless it was properly before the Court. The referees did not certify the evidence to the Court, nor was it embodied in a bill of exceptions, or, in any other manner known to the law, placed upon the records of the Court, so as to be examined. The force of this was felt and anticipated by the appellants; and after the report had been made and filed, they procured the *ex parte* affidavits of the gentlemen who had served as such referees, and offered to, and did, file them in reference to the said evidence having been reduced to writing, &c.

These gentlemen had no right, at the time these affidavits were made, to have certified to the correctness of the evidence written down. Their powers had ceased. *The Indiana Central Railway Co. v. Bradley*, 7 Ind. R. 53. Much less could they bind the parties by *ex parte* affidavits.

But even if they had, without having been required to do so by the order of the Court, seen proper to have written down and certified the evidence, we think it is exceedingly doubtful whether the Court would have been justifiable in considering it. *Bigelow v. Newell*, 10 Pick. 348.—*Ward v. The American Bank*, 7 Met. 486. And if it would have been proper to look into the evidence, the party objecting to the rendition of a judgment thereon would have been in no better condition than if the verdict of a jury had been returned against such party, and the object was to get clear of it. 2 R. S. p. 233, § 24.—7 Ind. R. 54.—*McKinney v. Pierce*, 5 id. 422.

The appellee contends that our statutes are so ample as to give the referees authority to try questions of law and fact (2 R. S. p. 116, § 349); that they have the same powers as a Court to receive or exclude evidence, to make up a record, and consequently to sign bills of exceptions. *Id.* p. 116, § 350. If required, they make a special finding of the facts, which then stands as a special verdict. *Id.* p. 117, § 350. And upon that the Court would find the law, and pronounce the judgment. But if required, they must find the facts (which are equivalent to a special verdict), and also the conclusions of law thereon (which stand in the place of the judgment of the law to be found by the Court upon the special verdict). *Id.* p. 116. In a word, when both these duties are required of the referees, their report stands as the "decision of the Court," and judgment is to be entered thereon. *Id.* p. 116. If this is correct, then, *quære*, ought not the evidence, to have made it a part of the record, to have been contained in a bill of exceptions signed by the referees? and ought not a motion for a rehearing to have been made before them, to enable a party to obtain the benefit of that evidence and exceptions?



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If they are not required to report either the law or the facts, then their report stands as the general verdict of a jury. 2 R. S. p. 233.—7 Ind. R. 54. And no way exists to get the evidence, upon which that finding is based, before the Court, unless the right exists to take a bill of exceptions, to be signed by said referees. 7 Ind. R. 58. The facts may be brought before the Court by requiring them to be reported, &c. Indeed, the appellee insists that upon a reference, there is no mode provided by our present practice, to bring the evidence heard by the referee, before the Court.

We, therefore, earnestly insist that the Court did right to refuse to go behind the facts found, to look into the evidence.

As to the 3d and 4th specifications, they relate to the rulings of the referees in regard to the admission of evidence. If the views we have already expressed in reference to rights and powers of referees and parties, are correct, then these objections at once fall, for they are not in such shape as will enable this Court to consider them. How is it known to this Court, or the Court below, what those rulings were? For aught that legally appears in the record, there was no objection to the admission of any evidence, or it might all have been received by the agreement of the parties.

The balance of the specifications, except the last two, are based upon the conclusions of law arrived at by the referees. There was no formal motion made to set aside the report, but the resistance came in the form of an objection to the rendition of judgment upon said report.

Waiving this objection for the present, for the sake of the argument, and assuming as true that the facts reported stand as the special verdict of a jury, the question presents itself, first, whether the conclusions of law thereon by the referees were correct; and if not, then, secondly, whether the general determination of the referees is supported by the facts found, without regard to such erroneous conclusions of law, if any such exist.

The principal error complained of in the decision of the law, is mentioned in several forms in the 5th, 6th, 7th, 9th, and 10th specifications, which are, we suppose, based upon this conclusion of the referees, to-wit:

"No doubt the law requires the trustees, so far as they have the means, to furnish the canal [with water] for the purpose of navigation; but this general provision of law cannot be allowed to control or authorize the breach of a positive contract."

This sentence, together with what precedes and follows it in the finding, it is asserted by the appellants, does not contain a correct exposition of the law.

By the statutes of 1846 and 1847, the canal, with its appurtenances, and the revenues and lands belonging thereto, were to be transferred to certain trustees for the benefit of the bondholders of the state. The proceeds of these lands, &c., were, to a certain extent, to be applied to the completion of the canal, which was then in an unfinished condition. Acts of 1846, p. 7. And, generally, by § 10, p. 10, it was made the duty of the trustees to complete said canal; and, by § 23, p. 15, they were empowered to locate and construct reservoirs, &c., necessary to supply said canal with water. It is now assumed that this was an absolute duty or obligation resting upon said trustees, of so binding a character, as to justify them in the breach of a contract entered into for the very purpose of enabling them to discharge this duty. The pleadings and facts found, show that the trustees were constructing a reservoir to supply water to said canal. They will not presume to say that such structure was not



necessary, for that was the only condition upon which they were empowered to build it. Then, conceding that it was necessary, and was in process of construction under the written contract which the referees find was entered into, we insist that, although there may have been a general and ultimate obligation resting upon the trustees to supply water as far as they could do so, yet that obligation was, as a matter of course, and of necessity, subsidiary to the more immediate and pressing obligation to first construct the works, and then furnish the water which such works were intended to supply. If the position of the trustees is correct—that it was their duty, under the law, to detain the water in the unfinished reservoir, even in violation and breach of a subsisting contract to complete the same—such position can be correct on one hypothesis only, i. e., that the work to be done under the contract was not necessary to be done to furnish a sufficient supply of water; and, therefore, that they were expending large sums of money, in violation of their duty, their oath, and the trust reposed in them as such trustees. This we cannot believe they will concede.

But looking at the matter in a more strictly legal sense, we do not believe that there was any such duty devolved upon them in that respect as would exonerate and discharge them from solemn contracts legally entered into. Here was a contract regularly entered into, under which the contractor had expended large sums of money. They had authority to "make contracts for work and labor on said canal," &c. Acts of 1846, p. 10, § 10. And the word "canal" includes reservoirs. *Id.* p. 15, § 23. And as between said trustees and a contractor, to do such work, we say that they cannot, in law, and as a bar to the payment for such work, be permitted to say this work was not necessary; they are estopped by the contract from setting up such defense. The necessity of it cannot be inquired into in such proceeding. It is presumed to exist, and that they were in the line of their duty in engaging the doing thereof. Therefore, a contract made for such purpose cannot be violated with impunity; and if so violated, they must, in the language of the referees, "respond in damages." The Court did right, therefore, to overrule such exceptions as applied to that point.

But if we are mistaken in this, and the exceptions should have been sustained to the conclusions of law above discussed, then we contend that, such legal conclusion having been disapproved and set aside, would leave the finding of facts standing as, and even stronger than, the special verdict of a jury; and the business of the Court would be to render judgment, upon such finding of facts, as the Court might find the law to be arising thereon.

The facts found in this case, then, fully authorize the judgment entered.

The issues made, and the finding applicable thereto, are as follows:

Complaint.—The first paragraph of the complaint is on a written contract, alleging performance, and failure of defendants to pay.

Answer.—The defendants deny that the plaintiff performed, &c., and aver that he did not, and that they paid for work done, &c.

Reply.—The plaintiff reiterates performance on his part, and failure to pay, and denies affirmative matter.

The referees find that the contract was entered into, &c.; that it was two-thirds completed, in accordance with directions; and that the plaintiff was, by the acts of the defendants, prevented from completing the same; and they

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find the value of the work done by, and the amount of the damage caused to, the plaintiff.

Upon that finding, then, the law would give the plaintiff a judgment. See 1 Smith's Lead. Cases, top p. 43, subdivision 4, where many authorities are cited.

Complaint, second paragraph.—On the contract, and an averment that by the acts, &c., of the defendants, the plaintiff was compelled to, and did, abandon the said work, after having expended, &c.

Answer, second paragraph.—Denial of part performance, &c., or that he was compelled to abandon, &c., or that they failed to pay, &c.; averment, that he was paid, &c.

Reply, second paragraph.—1. A denial. 2. Reiterating specific acts of the defendants, which compelled him to abandon, &c.

Finding as above referred to, and specifying acts of defendants which prevented plaintiff from completing, and that he would, but for them, have completed the work, &c.

We say, then, that upon this issue, the plaintiff was entitled to a judgment by the law.

Complaint, third and fifth paragraphs.—Each avers that a contract was made; and the third avers that, by mistake, certain stipulations were inserted and others left out of the written contract, &c. The fifth had like averments, and that the omission and insertions were through the fraud, &c., of defendants, &c. Averments in both, of part performance by plaintiff, and failure by defendants to perform, &c.

Answer, third and fifth paragraphs.—Denial of contract as averred, or of mistake, or fraud, &c.

Replies, third and fifth paragraphs.—Denials of affirmative matter, &c.

Upon these two paragraphs (though not specially applied to them) the finding is, that the contract (written) was fairly entered into, and that the evidence did not show fraud or mistake, &c.; and the other portions of said issues on said paragraphs are in effect for the plaintiff.

We do not desire to go at length into the question of whether the judgment should be for the plaintiff or the defendants on the finding as applicable to the issues made upon the third and fifth paragraphs of the complaint, for the reason that we believe that the judgment of the Court can be amply sustained upon the finding as applied to the other paragraphs.

Complaint.—The fourth paragraph is for work and labor, for materials, for money paid, &c., and for property taken, &c., to-wit, logs, timber, wood, &c.

Answer.—The fourth paragraph is a denial, &c., and averment that plaintiff is indebted, &c., for money, &c.

Reply.—The fourth paragraph is a denial of the affirmative matter.

The finding is that the plaintiff was to have 15 dollars per acre for the clearing, and the timber, logs, and wood; that before the completion of the contract, the defendants turned, and caused to be turned, large amounts of water upon the ground to be cleared, so as to submerge and overflow the same, and the said timber, logs, wood, &c.; that, in consequence of such acts, the plaintiff was compelled to abandon the work and his said logs, &c.; that, but for such overflowing, he would have completed his contract and secured the use of his said timber, &c., before the day fixed for the completion of said



contract; that said timber was of the value of 9 dollars per acre; that the price of the work done and value of timber was 13,205 dollars; the amount paid, 7,120 dollars; amount due, 6,085 dollars, which sum is found for the plaintiff.

Take the whole finding, and we undertake to say that, without doubt, the law upon the same is in favor of the judgment entered thereon; for the submission of the matters in controversy, if the submission had stopped there, would have required of the referees a report of a character that would have caused them to determine the law and the facts both, and such determination would have been final and binding upon the parties in the absence of fraud. The mere fact that the referees, besides determining the matters in controversy, were also required to report the facts and conclusions of law, did not divest them of the right, nor clear them of the responsibility, of determining such questions of law and fact generally, and as fully as if the additional and special report had not been required of them.

If the report of referees is, as may be contended, to be governed by the same rules as awards, then none of the statutory reasons, or causes, have been assigned for setting the same aside. 3 R. S. p. 231. And, *quære*, can any other be assigned?

As to the 11th specification, it assumes that the referees had come to the conclusion that the law unconditionally and positively required the trustees to furnish a clear field for operations; when, in fact, the conclusion is only comparative, i. e., that they were as much bound to do so as a person who had contracted with a mechanic to build a house is bound to furnish an eligible site for it. Therefore, if there was no legal obligation in the one case, there would be none in the other; but if there was a legal obligation in the instance of the house, we would like to see why there would not be in the other. It is true, the reasons, following this proposition, by the referees, about withdrawing the water, leads to the determination that, so far as the trustees had power to do so, they ought to have kept off the water—that it was a legal right the contractor had to expect. And we would like to see any reason given to show that they were wrong.

There was a further argument by Judge Hanna, and a lengthy brief by Mr. Thompson, upon points not touched in the opinion of the Court.

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### WILSON v. TESSON and Another.

The act "to authorize the business of general banking," approved May 28, 1852, was repealed by that of 1855, upon the same subject.

Banks organized under the former act, refusing to comply with the provisions of the latter, ceased to exist as corporations at the time therein prescribed; and no judgment of forfeiture was necessary, to terminate their corporate powers.



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A contract made by the officers of such bank, in their corporate capacity, after its powers as a corporation had ceased, does not bind the stockholders.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Suit against the *Bank of the Capital* as a corporation, organized in 1854, under the act of 1852, and *Andrew Wilson*, as a stockholder therein, to recover a debt contracted by the bank, in the course of banking business, in *September, 1857*.

Answer by *Wilson* in eight paragraphs, one of which alleged that said *Bank of the Capital* had never assumed to comply with the requirements of the act regulating general banking, passed in 1855.

The bank made default. A demurrer to *Wilson's* answer was sustained, damages were assessed, and final judgment against the bank and *Wilson*. *Wilson* appeals.

The case turns upon the question whether the bank had power to continue its general banking business after the coming into force of the act above mentioned, of 1855.

The general banking law of 1852, under which the *Bank of the Capital* was organized, contained this provision:

"The legislature may, at any time, alter or repeal this act," 1 R. S. p. 160, § 32. It was in the power, then, the legislature to terminate the existence of banks, created under said act, at its pleasure; as it will scarcely be denied that a repeal of the law would work such termination.

The right to bank as a corporation was a franchise granted by the legislature—when the franchise was taken away the right ceased. And if the legislature could unconditionally terminate the existence of the banks by repeal of the law, it could impose conditions upon which they might continue to exist.

It is admitted that the reprinting or reenacting of an existing section of a law, or of an entire statute, without material alteration, will work no change in the law. 1 Dig. 865. But if the latter section or statute materially differs from the former, it repeals it. The latter becomes the law.

In 1855 the legislature did repeal the banking law



1852; for that body amended that law by substituting a new act, covering all of the ground of the act of 1852, and also, much additional. And, as we have said, when the legislature amends a section of an existing law, or the entire law, by substituting an entirely new, and substantially different section in its place, the former section is repealed, and the latter becomes the law. In this case the legislature amended an entire existing statute, by substituting an entirely new, and substantially different, statute in its stead. It was as if the legislature had first expressly repealed the banking law of 1852, and then enacted the law of 1855. On the repeal of the act of 1852, the powers of the banks organized under it, to do business as corporations, ceased, unless the statute provided otherwise. *The State Bank v. The State*, 1 Blackf. 267.—Ang. and Ames on Corp., 2d ed., pp. 128, 667.

The statute did provide otherwise. The 48th section of the act of 1855 reads thus: "Every bank or banking association, organized under the provisions of the general banking law of this state, may, in case it shall immediately after the passage of this act, pay all its circulating notes in coin, upon demand, have until the first day of *March*, 1857, to wind up, or accept the provisions of this act." See, also, 1 R. S. p. 240, § 6.

Banks, then, existing under the act of 1852, on the coming into force of the act of 1855, had an election, to refuse to comply with the requisitions of the latter act, cease to do a banking business, and to wind up; or to comply with these requisitions and proceed with their banking business; but they had no power to proceed with such business till in compliance. And if they failed both to comply, and to wind up, it was made the duty of the auditor of the state to wind them up. But it was the duty of the banks to wind up without the interference of the auditor.

The *Bank of the Capital* having failed to comply with the requirements of the act of 1855, had no power to do general banking business in its corporate capacity, after it came into force. We say nothing of its power as a private association.

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It is contended by the appellees that its powers continued till a forfeiture was judicially declared. This is not correct. In cases of corporations in whose charter no power of repeal is reserved, and a forfeiture is claimed for misuser or non-user, the doctrine of judicially declared forfeiture applies. *The State v. The Vincennes University*, 5 Ind. R. 78. It has no application to cases of a deprivation of power by a legislative repeal, in the exercise of an unconditional right reserved. The officers of the bank, in this case, then, having assumed to make a contract, in their capacity as such, which they had no power to make, the stockholders are not liable upon it as corporators.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for further proceedings in accordance with this opinion, if by amendment or proof the case can be brought within it.

*L. Barbour* and *J. D. Howland*, for the appellant (1).

*J. L. Ketcham*, *I. Coffin*, and *W. W. Wick*, for the appellees (2).

(1) Counsel for the appellant submitted the following argument:

There is really but one question presented by this record. It appears in various forms—upon the complaint, the answer, the evidence, and the motion for a new trial. All result in this: Did the free banks, organized under the act of 1852, continue as subsisting corporations after the act of 1855 became the law? Or, at most, did such of these banks as did not comply with the requirements of the latter act, continue to exist as corporate bodies, after the first day of March, 1857?

We assume the following positions:

I. Our constitution permits but one system of free banks.

II. The general banking law of 1852 was repealed by the general banking law of 1855.

III. That a bank organized under the act of 1852 had no authority, after the act of 1855 went into operation, to do any banking business beyond what was necessary to wind up its concerns, unless such bank, at some time prior to the first day of March, 1857, had accepted and complied with the provisions of the last-named act.

IV. That immediately upon the repeal of the general banking act of 1852, the corporations existing by virtue of its provisions, which had not, within the proper time, accepted and complied with the terms upon which their continued existence was made to depend, expired without any judicial decision determining their existence.

*First*. We conceive it requires no argument to support the first proposition we have advanced. Section 2, art. 11, of the constitution affirms, that "No



banks shall be established otherwise than under a general banking law, except as provided in the fourth section of this article." Section 3 defines the limits and restrictions for such a system, and the fourth section provides for a state bank, with branches. Banks of issue must, therefore, exist by virtue of a general act. This rule of the organic law prohibits the issue of paper, having the similitude of bank notes, by voluntary associations, not organized under the general banking law. See opinion of Judge PERKINS, in *Anderson v. Alexander*, in the *Putnam* Circuit Court. The phrase "general" excludes the idea of more acts than one; the law ceases to be general, when it adopts and tolerates two or more systems.

*Second.* The second proposition assumes that the general banking act of 1852 was repealed by the general banking act of 1855. The act of 1855 (Acts of 1855, p. 23, *et seq.*), is entitled "An act to amend an act to authorize and regulate the business of general banking." It proceeds, in the first place, to recite all the old law, after which the following phraseology is employed by the legislature: "Be and the same is hereby amended to read as follows." The act of 1855 then appears section by section, from § 2 to § 56, inclusive. We urge upon the consideration of the Court the force of this language. Suppose a single section of this act, or any other act, were amended by the legislature. The amending act would recite the section proposed to be amended, and proceed, after the phrase, "be and the same is hereby amended to read as follows," to set out the section as amended. What would be the effect of this amendment? We presume it would operate as a repeal of the former section. It would be evidently designed as a substitute for it, and on that ground a repeal by implication would result. But there is more in this language—"shall be amended to read as follows"—than a repeal by implication merely. If the act is to read as follows, it can only be read as follows. The sections following are the law which the legislature authorize the Courts to read, and not the preceding sections, which are recited merely to be amended, and which, if read at all, can only be read for the purposes of construction, as showing what the old law was.

We argue further, that a reading of the act of 1852, and that of 1855, will show that each was designed to cover the whole ground of a general banking system. They prescribe all the steps from the organization of the bank, for its management, its securities, circulation, deposits, reports of its condition, &c., through all the usual details, to its final winding up. Each act, at the time of its adoption was designed to be complete. When the act of 1852 was passed, the legislature, guided by what information they possessed on this intricate and difficult subject, endeavored to make the enactment perfect as far as they were able. A few years experience brought to light various defects in the system, which, for the protection of the public, appeared to need additional guards and securities, and severer penalties. To effect the necessary modifications, two methods were open to the legislature. One was, by selecting such sections as it was necessary to modify, and amend these in conformity with the constitution; and if further sections were necessary, to adopt them. The other method was, to revise the whole act, and adopt a substitute for it. The latter course was the one pursued in this instance, for the whole subject-matter is reviewed, and the legislature, at the time of the passage of the later act, standing where an experience of the defects of the former one had placed them, endeavored to employ this experience by making a new law, covering the whole

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subject-matter; in short, the act of 1855 is a revision of the former legislation upon the subject of general banking.

The internal evidence in support of this position is exceedingly strong. To glance at the most prominent feature it presents, the 48th section of the act of 1855 reads thus: "Every bank or banking association, organized under the provisions of the general banking law of this state, may, in case it shall immediately after the passage of this act pay all its circulating notes in coin upon demand, have until the first day of *March*, 1857, to wind up, or accept the provisions of this act."

Here is an express provision in the act of 1855, which contemplates the sweeping consequences which result from a repeal, and provides a remedy. It is as if the legislature had said in express terms—the act of 1852 is repealed by virtue of our revision; but it is not the design to destroy the corporations already existing under the act of 1852. Such of them as pay immediately after the revision all their outstanding circulation, in coin upon demand, shall have their period of grace, until the first day of *March*, 1857. During this interval they may close up their business; or, if they so elect, they may conform to the revision. And this temporary continuance of corporate life for the purpose of winding up, and the indefinite extension of that existence, upon conforming to the new law, are derived, not from the act of 1852, but from the act of 1855. Now the intention of the legislature is self-evident. If it were not in the mind of the law-making power to repeal the act of 1852, no amnesty to the banks already existing could have been regarded as necessary.

Again; under the act of 1852, the number of corporators is undefined; it may be one man, or a thousand. But the act of 1855, § 2, declares that the number shall not be less than eleven. The 17th section of the same act reiterates this limitation. Supposing that no repeal was intended, this determination of a number essential to the organization of a corporation, could not affect the banks already organized. On the other hand, if a repeal was intended, the restriction as to number would apply equally to all. In that case, some proviso would be necessary to preserve the corporate existence of the old banks, unless in their reorganization under the act of 1855, they should, while conforming in other respects to that act, conform also in regard to the numbers. As an indication of what was the intent of the legislature, we find in section 17 of the act of 1855, a proviso, that the provisions of that section shall not apply to the banks now in existence, respecting the number of stockholders. This proviso being only necessary in case of a repeal, clearly proves that a repeal was designed.

Nor is there anything in the general law of the state at war with this view. Section 6, 1 R. S. p. 240, provides that "all corporations whose charters shall expire by limitation, forfeiture, or otherwise, shall nevertheless be continued bodies corporate, for three years after the time they would have been so dissolved, for the purpose of prosecuting and defending suits, to which they are a party, and to enable them to settle, dispose of, and convey their property, and divide the capital stock, but not to continue the business for which such corporations were established." This enactment confines the exercise of corporate powers to such purposes as may be necessary for winding up the business of the corporation, and expressly prohibits anything beyond that point.

Turning, then, to an examination of authorities, we propose to confirm these reasonings upon our second proposition.



"It is well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms; and even if the subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act." Sedgw. on Stat. and Con. Law, 124.

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Can it be questioned that the act of 1855 "was clearly intended to prescribe the only rule that should govern in the case provided for?"

"If a revising statute embrace all the provisions of antecedent laws on the same subject, and reduce them to one system, such revising statute virtually repeals the statutes revised, without any express provision to that effect. The rule is thus laid down in one case: A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as on reason and common sense, operate to repeal the former." Smith's Comm., § 786.

*Nichols v. Squire*, 5 Pick. 167, was a *qui tam* action on a *Massachusetts* statute of 1785, designed for the suppression of lotteries. The Court, in deciding the cause, remark—"We think the statute of 1785, c. 24, upon which the *qui tam* is founded, is repealed, if not by the statute of 1800, yet certainly by the statute of 1817, c. 191, which appears to cover the whole subject-matter of the statute of 1785. By the statute of 1817, the selling of tickets in any lottery not granted or permitted by this commonwealth, is prohibited under a new penalty; and when the legislature impose a second penalty for an offense, whether smaller or larger than a former one, a party cannot be allowed to sue on one or the other at his option. This point of a repeal by implication is supported by authority. *Dwarr. on Stat.* 673. In the case of *Bartlett v. King*, 13 Mass. R. 537, an exceedingly useful statute, passed in 1754, concerning donations and bequests to heirs and charitable uses, was held not to be in force, the legislature having, in 1785, legislated upon the same subject-matter, and omitted to reenact the provisions of that statute."

The same Court, in the case above cited, which was an action to recover a legacy, settle the same principle, under circumstances more nearly analogous to those we are discussing. It was contended on behalf of the executor, that the legacy was within the provincial statute of 28 Geo. 2, commonly called the statute of mortmain, and was, therefore, void. In reference to this statute, the Court say: "It is not, however, very material now to settle the construction of that statute, as we are fully satisfied that it is virtually repealed by the subsequent statute of 1785, c. 51. A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate as a repeal of the former, according to the case of *Rex v. Cator*, 4 Burr. 2026, in which it was decided that a former statute, inflicting a penalty of £100 and three month's imprisonment, on persons enticing away artificers, was virtually repealed by a subsequent statute inflicting £500 penalty and twelve month's imprisonment for the same offense. The same principle was adopted in the case of *The King v. Davis*, 1 Leach's Cases, 306. All the subject-matter of the act of 28 Geo. 2, is contained in the statute of 1785. A part only of its restrictions and limitations in the second section is omitted in the latter; and it is very obvious, by



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comparing them, that the legislature considered the latter as a complete substitute and repeal of the former." *The Trustees of Phillips Academy v. King, Ex'or*, 12 Mass. R. 546.

The same Court have settled the question that the common law is superseded by statutory enactments, and, in connection with that question, remark—"The question, then, is whether the common law has been superseded by the statute of 1814, and the Court are of opinion that it has been. The whole subject has been revised by the legislature. \* \* \* A statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first." *The Commonwealth v. Cooley*, 10 Pick. 37.

It is proper to remark, that in the act of 1852, § 31, the legislature have reserved the right, at any time, to alter or repeal the act. The Supreme Court of Georgia, in the case of *The Union Branch Railroad Co. v. The East Tennessee and Georgia Railroad Co.*, 2 Law Reg. 308, decide a case of implied repeal, and consider the question whether there is any difference in the legislative proceeding by which an act of incorporation—in which the legislature have reserved the right of repeal—is repealed, and that by which any other act is repealed. "It was urged," say the Court, "that contracts may be made, and rights may vest under such an act, and in reliance upon it. This is so; but is just as true of any other act whatever. And he who contracts, or invests under such an act, surely does it with notice, and with a full sense of the risk he takes. What difference, then, is there on principle, between the repeal of such an act, and any other, securing important rights and privileges to the citizen, and which may be repealed? And why any difference in form, or greater solemnities in repealing such an act? We find no such distinction anywhere drawn. The common-law doctrine is, that "every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto; for *leges posteriores priores contrarias abrogant*." Dwar. on Stat. 673.

In the Supreme Court of New York a case is decided, where, in an action brought to recover tolls, the defense pleaded was an exemption under the statute. "It is urged," say the Court, "that the defendant was exempt from the payment of tolls by the 36th section of the turnpike act, which was adopted by the act of March 12, 1847, and made applicable to plank-roads. But we are of opinion that the act of 1850 repealed the exemptions contained in the turnpike act so far as it was applicable to plank-roads. Both acts affected the same class of persons; but the act of 1850 has peculiar and more stringent provisions than the turnpike act. The 36th section of the turnpike act, before alluded to, exempts 'all persons going to and from a grist-mill for the grinding of grain for family use.' This was probably broad enough to protect the defendant. But the eighth subdivision of § 2 of the act of 1849, inserted by way of amendment (see Laws, 1850, p. 80), introduces several important limitations to the right of exemption. It provides, that to exempt persons going to and returning from a grist-mill, it must be the mill where they ordinarily get their grinding done; the exemption extends to one gate only; the gate must be within five miles of the residence of the person claiming the exemption; he must be going to the mill for the express purpose of getting his grist ground; and such exemption is made to apply only to a plank-road, or such part of a plank-road, as was constructed on an old highway; not, therefore, to a turnpike. Now it must be conceded that repeals by implication are not favored by the Courts; but a subsequent statute repugnant to a prior one repeals it; and



it is laid down in *Davies v. Fairbairn*, 3 How. (U. S.) 636, that if a subsequent statute is not repugnant in all its provisions to a prior one, yet, if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the prior one. Under this rule, the 36th section of the turnpike act, so far as it applies to plank-roads, is repealed. No man can doubt that it was the intention of the legislature to prescribe certain conditions and limitations to the right of persons going to and returning from mill, when exemption should be claimed on that ground from plank-road companies." 16 Barb. 15.

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*The Board of Trustees of the Illinois and Michigan Canal v. The City of Chicago*, 14 Ill. R. 334, is a case in point. "It was provided by an amendment to the charter of the city of Chicago, passed in 1847, that when the common council should desire to appropriate land for the use of a street, they should present a petition for the purpose to some Court of record in Cook county, or judge thereof, in vacation; that the Court, or judge, should thereupon appoint three commissioners, to inquire into the necessity of the appropriation, and ascertain the compensation to be paid to the owners of the land, and assess the cost of the improvement upon the real estate to be benefited thereby; and that the Court or judge might approve the report of the commissioners, and condemn the land embraced in the street. Under this provision, the corporation, in February, 1849, presented a petition to the Cook county Court, representing that it had located a certain street, and desired to appropriate the land over which it passed; and praying for the appointment of commissioners, and the condemnation of the land. Commissioners were appointed accordingly; and an order was made in May, 1849, approving their report, and condemning the land. A writ of error was then sued out of this Court; and at the June term, 1851, the order was reversed and the cause remanded.

"The 'act to reduce the law incorporating the city of Chicago, and the several acts amendatory thereof, into one act, and amend the same,' approved February 14, 1851, provided that whenever the common council should lay out a street, they should, after giving ten day's notice of their intention to appropriate the land necessary for the same, choose, by ballot, three commissioners to ascertain the compensation to be paid to the owners of the land, and assess the cost of the improvement on the real estate to be benefited thereby; and that the common council might approve the report of the commissioners, and then proceed to have the street opened.

"In October, 1851, the Court made a new appointment of commissioners. They made a report to the Court in August, 1852; and an order was entered in February, 1853, approving of their proceedings, and condemning the land for the purposes of the street. An appeal was taken from the order.

"The application of a few plain principles will dispose of this case. If two statutes are clearly repugnant to each other, the one last enacted operates as a repeal of the former. Dwarr. on Stat. 673.—*The King v. The Justices of Middlesex*, 2 Barn. and Adol. 818.—*Bowen v. Lease*, 5 Hill, 221.—*M'Quilkin v. Doe*, 8 Blackf. 581.—*Commercial Bank v. Chambers*, 8 Smed. and Marsh. 9. When a statute is repealed, it must be considered, except as to transactions passed and closed, as if it had never existed. Dwarr. on Stat. 676.—*Kay v. Goodwin*, 6 Bing. 581.—*Surtees v. Ellison*, 9 Barn. and Cress. 750.—*M'Quilkin v. Doe*, 8 Black. 581. The repeal of a statute conferring jurisdiction, takes away all right to proceed under the repealed statute, even in suits pending at



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the time of the repeal, unless they are saved by a clause in the repealing statute. *Miller's case*, 1 W. Blacks. 451.—*Butler v. Palmer*, 1 Hill, 324.—*Springfield v. The Overseers of Highways*, 6 Pick. 501.—*Matter of Road in Hatfield Township*, 4 Yeates, 392.—*Hunt v. Jennings*, 5 Blackf. 195.—*The Commonwealth v. Beatty*, 1 Watts, 382.—*Fenelon, &c.*, 7 Barr, 173. A subsequent statute, revising the whole subject of a former one, and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former. *Bartlett v. King*, 12 Mass. R. 537.—*Towle v. Marrett*, 3 Greenl. 22.—*Nichols v. Squire*, 5 Pick. 168.—*Pulaski County v. Downer*, 5 Eng. 588."

In another part of the decision, the Court remark, after pointing out the conflict between the two acts—"In this respect the two acts are plainly repugnant to each other; and the last by necessary implication, operates as a repeal *pro tanto* of the former."

*M'Quilkin v. Doe*, *supra*, was a case arising on the construction of the road laws of 1822 and 1824. The Court say—"All we now decide is, that the road law of 1822, at all events, ceased to exist after that of 1824 went into operation. These road laws were clearly repugnant to each other, and there is no reason shown why the first should not be considered as repealed by the last."

Preliminary to the comparison of the two enactments, we call the attention of the Court to the cases of *Norris v. Crocker*, 13 How. 429, and *The Peru and Indianapolis Railroad Co. v. Bradshaw*, 6 Ind. R. 146.

The repugnancy between the act of 1852 and that of 1855 will appear from the method of comparison sanctioned by these authorities:

1. Section 1 of the act of 1852 leaves the number of corporators indefinite. It may be composed of one or any number of persons.

Section 2 of the act of 1855 provides that the association shall be composed of not less than eleven persons.

2. Section 1 of the act of 1852 requires no residence in the state for the corporators.

The corresponding section in the last act requires that a majority of the shareholders shall be residents of the state.

3. Section 3 of the act of 1852 restricts the issue of bills of a less denomination than five dollars to one-fourth of the whole issue. The act of 1855, § 4, restricts these issues of small bills to one-twentieth of the whole circulation.

4. Section 5 of the act of 1852 makes no limitation upon the amount of stocks or bonds to be deposited, as securities for the redemption of the circulation, with the auditor of state. The corresponding section, 6, of the act of 1855, limits the sum to be deposited as security to an amount not less than 50,000 dollars.

5. By the act of 1852, notes may be issued by the auditor to an amount equal to the par value of the stocks or bonds deposited. The act of 1855 requires 110 dollars of deposit for every 100 dollars of circulation.

6. The act of 1855, § 6, restricts the issue of the circulation to *bona fide* residents, and *bona fide* owners of the deposited stocks or bonds. This is a new feature.

7. The act of 1855 limits the aggregate circulation of all the associations formed under it to 6,000,000 dollars; and provides that no association shall have a greater circulation than 200,000 dollars.

8. The act of 1855, § 6, makes the circulation receivable for debts due to



the corporations, and continues this right of set-off for one year after a transfer.

9. Section 8 of the act of 1852, in cases of failure to redeem, and a protest therefor, provides for notice to the makers of the notes. By the last act, this notice is to be given to the president and directors. On such notice by the auditor, the bank has, under the act of 1852, thirty days within which to redeem. By the last act, the payment must be immediate. The act of 1852 makes no express provision for the redemption, by the auditor, of notes not protested. That of 1855 places the non-protested paper, in this respect, upon an equal footing with that which has been protested. The act of 1852 makes the auditor of state the agent, with a discretion as to what method he thinks best, for the purpose of winding up a non-redeeming bank. That of 1855 calls in the governor, treasurer, and secretary of state to assist in winding up, and clothes this board with other powers in several respects.

10. The 6th section of the act of 1855 has two new features: it declares that notes protested shall have no preference over non-protested notes; and requires that all the notes protested at one time shall be included in a single protest.

11. Section 16 of the act of 1852 leaves the amount of bills which the auditor is authorized to countersign limited only by the amount of securities deposited; while that of 1855 restricts the aggregate circulation of all the free banks to 6,000,000 dollars; and that of any one of them to 200,000 dollars.

12. Section 17 of the act of 1852, leaves the number of corporators unrestricted, and fixes the capital stock at not less than 50,000 dollars; leaving the amount of bonds and stocks deposited, and the amount of circulation countersigned and issued upon them without any limit, so that it may be greater or less, by any amount, than 50,000 dollars. The act of 1855, in a corresponding section, reaffirms the rule that the stockholders must number at least eleven, and requires that not less than 50,000 dollars in bonds or stocks, shall be deposited; with, however, the proviso, that the feature as to the number of corporators shall not be made to apply to the banks organized under the law of 1852.

13. The act of 1852, in the second subdivision of section 18, does not fix the population of the place where such bank shall be established; the corresponding subdivision in the act of 1855, prohibits the establishment of a free bank in any place having a population of less than one thousand, unless it be a county seat.

14. The act of 1852 is silent as to any board of directors, and prescribes no residence for the officers. Section 20 of the latter act, requires a board of directors, and that the president and cashier shall be resident citizens of the county where the bank is, or is to be, located.

15. While § 27 of the act of 1852, contains no such provision, the same section of the act of 1855 requires that, in the reports made to the auditor of the condition of the bank, the name, and place of residence of each shareholder shall be stated.

16. In stating what the reports shall contain, the first subdivision of the 27th section of the old law reads thus: "The amount of the capital stock, including that deposited with the auditor, paid in according to the provisions of this act." The new law has a corresponding paragraph, which is in these words: "The amount of stock paid in according to the provisions of this act, and the amount of stocks or bonds, together with a description of such stocks

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or bonds, deposited and transferred as aforesaid, as securities for the issues of such association; the then market value of said stocks, as near as the same can be ascertained; the date to which payment of interest has been made upon such bonds or stocks, and whether such interest has been paid to such banking association, or passed to their credit on the books of the auditor."

17. Section 28 of the act of 1852 requires a judicial proceeding to dissolve a corporation organized under it, for failing to make its reports; by the 28th section of the new law, the auditor is empowered to close the association without any judgment.

18. The 29th section of the act of 1855, is a new provision, requiring that a majority of all the stock of each of the free banks shall be owned, at all times, by resident citizens of this state; and it prescribes the mode of ascertaining this fact.

19. The old law, in § 29, provides that, in case any part of the original capital is withdrawn, and dividends continue to be made, while there are debts of the bank unsatisfied, a judgment closing the bank should be rendered. The new law meets this contingency, § 30, by a summary winding up, by the auditor of state.

20. Section 30 of the act of 1852, required certain statements to be filed with the auditor, on the first *Mondays of July and January* of every year; the same statements, under the new act, must be filed every ninety days.

21. The 34th section of the act of 1855 contains an important new feature: that "every bank organized under the provisions of this act, or the one to which this is an amendment, which shall have accepted the provisions of this act, shall mutually accept the circulating notes of each other, when offered or tendered by any person in payment of any debt or obligation."

It will be seen at a glance that these changes are radical. We invite special attention to but two of them. The old law placed no limits upon the aggregate circulation of the free banks; and none upon the particular circulation of each. They might each issue an unlimited amount—as much as each could purchase or borrow bonds or stocks to secure. They might increase to an indefinite number, till their aggregate circulation became enormous and dangerous. They did so increase; and the sudden and unlimited expansion of their issues having caused the disasters of 1854, was the very evil the new act was framed to remedy. So that act limits the particular circulation of each bank to 200,000 dollars; and the aggregate circulation to 6,000,000 dollars. If, however, the act of 1852 remains in force, and preserves the franchises of those banks organized under it, which have not accepted the new law, what becomes of these restrictions, which do not apply to them? And what becomes of the constitutional inhibition of more than one system of free banks?

Again; the act of 1852 had no provision that the banks organized under it were each to receive the bills of another in payment of debts. But the act of 1855 has such a provision. If both acts remain in force, preserving the vitality of the corporations organized under them, independent of the terms of grace afforded by the later act, here is an incongruity which gives us two systems, and tramples the constitution under foot.

The act of 1855 contains seventeen sections, additional to those we have above compared with corresponding sections in the act of 1852, which further illustrate the incongruity between the two systems. The auditor and treasurer of state are prohibited from becoming stockholders in a free bank, under pen-



ality; the association is required to carry on its business at the place designated in their issues, and where the directors, or a majority of them, reside; it must have a regular banking house, a sign distinctly painted, and regular banking hours; it is made unlawful, under a penalty, for any stockholder, president, cashier, clerk, teller, director, attorney, agent, or other employe of a bank, to buy the bills of any free bank at a discount; it is provided that banks already organized may comply with the new law, either by depositing the additional securities required by it, or by retiring so much of their circulation as will make their securities bear the proper ratio to their issues; 10 per cent. damages are given to the holders of protested notes; when a demand is made for the redemption of the notes of one bank, on behalf of another bank, the redemption may be made with the notes of that bank which makes the demand; when stocks or bonds depreciate 5 per cent., the depositing bank is required to give additional security; and on such depreciation, it is the duty of the auditor of state to receive and retain the interest accruing on the securities in his hands, until further stocks or bonds are deposited; the auditor is forbidden to issue any circulation to a bank, until its owners furnish him evidence that they own taxable property, subject to execution, other than their interest in the bank, within this state, of a value equal to 25 per cent. of the circulation, in lieu of which a bond may be given, to a like amount, as additional security for the issues of such bank; and until this is done, the auditor is required to withhold the interest due the bank; the governor, treasurer, secretary, and auditor, may appoint a bank commissioner, who has complete control given him of the books, safes, papers, &c., of the bank, to enable him to report on its condition, and a penalty is imposed on any one who fails to afford him such facilities; provision is made for continuing banks already existing, on their compliance with the new act; the auditor is directed to wind up any bank violating sections 27 and 30 of the law of 1855; the old banks may have six months within which to remove their places of business to some point of greater commercial importance; any person violating sections 16, 36, or 47, of the new law, is declared guilty of felony; the violation of sections 39, 41, or 47, is declared a misdemeanor; banks desiring to go into liquidation are required to give notice by publication, and the mode of canceling its notes, and surrendering its securities, is pointed out; all laws conflicting with the act are repealed; provision is made for agency at *Indianapolis* to redeem in coin, or *New York* exchange; and some minor provisions, which are not here noticed.

The foregoing are, we believe, new features, and certainly give a character to the system so totally different from that of the general banking law of 1852, as to prove that the acts are repugnant. It should not be overlooked that the act of 1855, § 53, declares all laws and parts of laws conflicting with it to be repealed.

*Third.* We proceed now to give some attention to our third point—that a bank organized under the act of 1852 had no authority, after the act of 1855 went into operation, to do any banking business beyond what was necessary to wind up its concerns, unless such bank, at some time prior to the first day of *March*, 1857, had accepted and complied with the provisions of the last-named act. The argument on this proposition has been anticipated in what we have advanced in support of our second point. It will be proper, however, to consider the internal evidence of the intent of the legislature in this respect.

There must have been something meant by the 48th section of the act of

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1855, that "every bank or banking association organized under the provisions of the general banking law of this state, may, in case it shall immediately after the passage of this act, pay all its circulating notes in coin upon demand, have until the first day of *March*, 1857, to wind up or accept the provisions of this act: *Provided*, that the auditor shall, in no case, issue any circulating notes to any bank until it shall have fully complied with the provisions of this act: *And provided further*, that if any bank shall fail to pay its circulating notes in coin, it shall be wound up and closed by the auditor pursuant to the provisions of this act." It would seem that no dispute could arise upon the construction of a section so plain as this. But we are driven to scrutinize it carefully, as an index of the meaning the legislature designed to give to the whole statute. Here were a number of banks organized under a system found by experience to be defective; a system created by a statute, in which the right was reserved to the legislature to alter or repeal at pleasure. A new system is devised, with a multiplicity of new features not before known to the law, and the old ones so changed that they cannot be recognized as the same. In the adoption of this new act, the legislature did not wish to destroy the banks already in healthy existence, and to avoid that injustice, they incorporate into the new law the section above quoted. Its object is two-fold. First, to test the solvency of the banks organized under the act of 1852. They must, immediately after the passage of the act, redeem their issues in coin, upon demand; if they fail in this, they are to be wound up without ceremony. If they stand this test of solvency, and desire to continue doing business, they have a season of grace, until the 1st of *March*, 1857, during which they may wind up, or accept the provisions of the new law. And, as if to put the matter beyond doubt, that nothing but winding up or accepting the terms of the law of 1855 was designed, the auditor is expressly prohibited from furnishing circulating notes to any bank, new or old, until it shall have fully complied with the last banking law. The old banks are reduced to this alternative, to pay specie or die on the spot; and paying specie, to conform in all other respects to the act of 1855, or to wind up and get themselves clean wound up and out of the way by the 1st of *March*, 1857. This is every inch of ground left them.

The various other provisions made in this act, for the purpose of opening the door to the old banks, indicates a like intention. It would be obviously unreasonable, if a bank was in a sound condition, and paying specie, to force upon its owners the necessity of bringing new partners into the concern—which they would be compelled to do, if the provision requiring not less than eleven associates was forced upon them. But the legislature avoid this injustice, by a proviso exempting the banks already in existence, from the operation of this rule. But the well known rule of construction derives, from this exception, an added force to all the other conditions. The new act requires that the bank shall be fixed in a county seat, or in a place having not less than a thousand population; another injustice is here avoided, by indulging the old banks with a period of six months, within which to remove their office, should such a removal be necessary. And a special section for their further accommodation is inserted, by which they may establish the new ratio between their securities and their circulation—110 dollars of the former to 100 dollars of the latter; either paying the additional 10 dollars on the hundred to the auditor, or retiring and canceling so much of their circulation as will establish the new ratio. These various provisions, and others which we have perhaps overlooked, either



mean that the subsistence of the already organized free banks depends on a compliance with the new statute, or they mean nothing.

The non-compliance suspends the existence of the bank for all purposes but the purpose of winding up, until the 1st of March, 1857, and then the concern is to expire. Winding up—what does this phrase mean? It defines and circumscribes all the remaining functions of the decaying bank. It must have a settled meaning. That meaning can be best understood by looking into the act on corporations, at a section *in pari materia*, which is strictly applicable to these corporations, except as to the term of three years, which it affords for the settling of the affairs of such a body. See 1 R. S. p. 240, § 6. The whole process is defined thus: "For the purpose of prosecuting and defending suits, to which they are a party, and to enable them to settle, dispose of, and convey their property, and divide the capital stock, but not to continue the business for which such corporations were established."

*Fourth.* We maintain that immediately upon the repeal of the general banking law of 1852, the corporations created under it, which had not accepted the terms of the new banking act, expired without the judgment of a Court against them. On the other side, it is insisted that some proceeding, in the nature of a *quo warranto*, is necessary to dissolve these associations.

The elementary writers on this subject, seem to entertain no doubt of the effect of such a repeal. Ang. and Ames on Corp., § 767. The authors seem concerned about these results. "When the legislature has, under a general statute, reserved to itself power to wind up the concerns of banking corporations, those provisions of the statute calculated to apprise all interested of the fundamental change about to be wrought, should be complied with, in order to give legal efficacy to the acts done under it; otherwise, the property of the corporation will not be divested, and its charter will continue in force. It is obvious from the distressing consequences which ensue the dissolution of a corporation, both to its members and creditors, that this reserved right of repeal is one, which, as a matter of policy, as well as of justice, should be exercised with the greatest moderation and caution. It would seem that, sometimes, the Courts are disposed to construe statutes of repeal with great strictness, as if they were in the nature of penal laws. It was upon this ground that the Supreme Court of *Michigan* refused to treat the act of the legislature of that state, repealing the charter of *The Bank of Oakland County*, as an act repealing a charter granted to, and constituting a banking corporation by the name of, '*The President, Directors, and Company of the Oakland County Bank*,' objecting to this want of descriptive certainty in the act of repeal."

We quote this passage, not as applicable to the law as it exists in *Indiana*; for we have a general statute giving all corporations three years in which to wind up; and in the act under discussion, a period is allowed the banks, until March 1, 1857; so that all these deplorable consequences are not to be considered in construing this statute. We cite this authority to show what the effects of a repeal are upon corporations, as well as upon individuals.

*Ducaris* expresses the result of the cases in this way: "When an act of parliament is repealed, it must be considered—except as to those transactions passed and closed—as if it never existed." Dwar. on Stat. 676. See, also, *M'Quilkin v. Doe*, *supra*, and cases there cited; *Mount v. The State*, 6 Blackf. 25; *The Trustees, &c. v. The City of Chicago*, 14 Ill. R. 334, and cases there cited; Am. Law Reg., vol. 2, p. 303; 2 Kent's Comm. 305, *et seq.*

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"We have next to consider the effects of the repeal, which, when it is clear and absolute, are of a very sweeping character. 'The effect of a repealing statute,' says a very eminent judge, 'I take to be, to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law.' *Kay v. Goodwin*, 4 M. and P. 341. Upon this principle, the repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it pending at the time of the repeal." *Sedgw. on Stat. and Con. Law*, 129, and cases cited.

We respectfully submit that the foregoing examination establishes these propositions:

That under our constitution, there can be but one system of free banks.

That the act of 1852 was designed to cover all the ground and embrace all the provisions necessary to define such a system.

That the act of 1855, containing a recital of the former law, and providing that the act be amended to read as follows, does, *ex vi terminorum*, repeal the act of 1852.

That the act of 1855, proposing to settle all the details of a general banking law, and embracing, with various modifications, all the sections of the former law, with various additional sections, is a revision of the whole subject-matter, and a substitute for the act of 1852; and is designed by the legislature to furnish the only rule upon the subject.

That under the constitution, which permits but one system of this nature, the two acts are entirely repugnant, and cannot co-exist as valid subsisting laws upon the statute-book, and therefore, as well from this inherent incongruity, as from the effect of the repealing clause in the later act, the former is repealed.

That the intent to repeal the act of 1852 is rendered certain by the pains taken by the law-making power, to provide for the continued existence of the banks already created, upon the condition of their accepting the provisions of the new law.

That, in the absence of such conformity on the part of the old banks, they had no corporate powers left, except for the purpose of winding up.

That after the period allowed, either for such acceptance, or such winding up, had expired—that is, after the first day of *March*, 1857, had passed—the banks organized under the act of 1852 had ceased to exist as bodies corporate.

(2) It being understood that the only question urged upon the Supreme Court, is that the act of 1855 (p. 23) repealed the general free banking law of 1852, Messrs. *Ketcham* and *Coffin* submitted an elaborate brief, in which they maintain as follows:

That the legislature did not intend to repeal, is evident, because—

1. The title of the act (last part of § 38) is to "amend."

2. "All laws and parts of laws conflicting with this act (§ 53) are hereby repealed." (Inferentially, the remainder is not repealed.)

3. Section 17, p. 37—"The provisions of this act shall not apply to the banks now in existence, respecting the number of stockholders."

Section 42—Every bank organized under the law of 1852, may comply with § 6, by adding stock or retiring circulation, &c.



Section 48—Every such bank redeeming its notes as presented, may have to *March 1, 1857*, to wind up or accept the provisions of the new act.

All these sections, and others like them, show that it was not the intention of the legislature to put an end to the banks organized under the law of 1852. But if that law was repealed by the law of 1855, it ended the existence of these banks at once.

The fact is, that prior to the act of 1855, the free bank paper had greatly depreciated. That was the evil. The remedy was, of course, to bring the paper up to par. This was to be done by requiring the banks to add stocks, or retire a part of their circulation, so as to make the proportion of circulation to the stocks as 100 dollars to 110 dollars. See § 6, p. 34, and § 42, p. 44.

But the prompt redemption of the circulation would maintain the paper at par, and § 48 was intended to apply to such banks while retiring their circulation.

Moreover, it is not at all necessary that a bank, under either act, should issue a dollar—or having issued, might retire it all, and still be a bank of deposit and discount. See § 17, p. 27. Compliance with this section organized a bank; but the bank had no circulation until compliance with § 5, p. 24.

It appears, therefore, that a bank of deposit and discount might well exist without any circulation. But the evil was as to the circulation, and the remedy pointed exclusively to that; and the remedy prescribed, and deemed adequate, was the addition of stocks, or retiring a part of the circulation.

Now, with this key to the whole act of 1855 in our hand, let us examine § 48 of this act—

1. The bank is required to pay its notes as they are presented at the counter for redemption. This it does, and, therefore, this part of the section is out of the way.

2. Until new stocks are added, the auditor shall not issue any circulating notes. That is not asked, and, therefore, this part of § 48 is out of the way.

3. The bank not failing to pay its circulating notes, the auditor has no authority or power to wind it up, and this part of the same section is out of the way. The only remaining part of § 48 is, "The bank may have until *March 1, 1857*, to wind up, or accept the provisions of this act."

Now what is to be understood by these alternatives "wind up," or "accept the provisions," &c.?

Still bear in mind, that the evil and remedy relate exclusively to the circulation. To "wind up" means to retire the circulation of the bank. To "accept the provisions," &c., means to give the proportion of notes to the stocks of 100 dollars to 110 dollars, by retiring part of the circulation, or adding stocks. Now, in a case where the bank is proposing to retire all its circulation, and is doing it as fast as the paper is presented (which was the case with this bank), and is not proposing to add any more stocks, when the 1st of *March, 1857*, arrives, has the bank become extinct? What is the section that wields the instrument of death? The most that this § 48 does, is to give day to the 1st day of *March, 1857*, to do the one or the other. But having done neither the one nor the other, what then? Where are the words of forfeiture in all this act, that takes away the franchises of the bank, as a bank of deposit and discount? Where is the section that authorizes the auditor or other power to wind up and terminate the bank. We deny, utterly, that any such termination of a bank in such a case, was ever contemplated.

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That the existence and continuance of the old banks until the 1st of March, 1857, is specifically provided for in this section, no one can dispute. But if the act of 1855 repealed their organic law (of 1852), they terminated at once; which latter hypothesis is utterly inconsistent with the former.

The conclusion is, therefore, that this bank still exists as a bank of deposit and discount, with power to retire the remainder of its circulation, and liable to have its stocks sold for that purpose, on failure to redeem its notes.

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LISTER v. MCNEAL and Wife.

In an action for slander, the Court may, in its discretion, after the jury is impaneled, permit the plaintiff to amend his complaint, by inserting a new set of words; or by striking out part of a set of the words originally charged therein, to have been spoken.

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APPEAL from the *Tipton* Circuit Court.

DAVISON, J.—*Delilah Chapman* brought an action against *Daniel Lister* for slander. Pending the suit, the plaintiff intermarried with *William McNeal*, who, on motion, with his wife, was made a joint plaintiff.

The complaint, after alleging an appropriate colloquium, avers that the defendant, on, &c., at, &c., falsely, &c., spoke and published, of and concerning the plaintiff, these words: "Old *Jane White* caught *Elzey White* and the girl, *Lile Chapman* (meaning the plaintiff, *Delilah*), in the barn at the thing itself;"—" *Jane White* caught *Elzey White* and *Delilah Chapman* at the thing itself;"—thereby meaning, &c.

Defendant answered in three paragraphs, to which the plaintiff replied. Demurrer to the replies overruled.

The issues were submitted to a jury, who found for the plaintiff; and the Court, having refused a new trial, rendered judgment, &c.

In a bill of exceptions, it is alleged that, after the jury were impaneled, the Court, the defendant objecting, permitted the plaintiff to amend his complaint by inserting



therein the following: "*George Dean* said old *Jane White* caught *Elzey White* and the girl (meaning the plaintiff, *Delilah*), in the barn at the very thing itself." And further, after the evidence and arguments of counsel had been submitted to the jury, the Court, over the defendant's objection, allowed the plaintiff to amend by striking out, from the first alleged set of words, the words "*Lile Chapman*," and inserting in lieu thereof the words "the girl, (meaning the plaintiff, *Delilah*)."

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It is enacted that "the Court may, at any time, in its discretion, and upon such terms as may be deemed proper, direct the name of a party to be added or struck out; a mistake in name, &c., to be corrected; any material allegation to be inserted, struck out, or modified; to conform the pleadings to the facts proved; when the amendment does not substantially change the claim or defense." 2 R. S. p. 48, § 99.

Neither amendment seems to have constituted any material change in the plaintiff's cause of action. The first merely adds the words "*George Dean* said;" and the second simply strikes out the words "*Lile Chapman*." Both, in our opinion, are plainly within the discretionary power conferred on the Court by the statutory rule of practice to which we have referred. 9 Ind. R. 554. And the ruling of the Court must, therefore, be sustained.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*W. Garver* and *J. E. Lewis*, for the appellant.

*J. Green*, for the appellees.

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### DAGGY and Others v. GREEN and Others.

The board of commissioners of a county, under the provisions of 1 R. S. pp. 310, 313, 316, §§ 15, 27, and 46, have no jurisdiction of a petition for a new



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road, unless it be shown affirmatively therein that the proposed highway will run "into more than one township."

A report made by viewers of a proposed highway, who own land along the same, is a nullity.

### APPEAL from the *Starke* Circuit Court.

DAVISON, J.—*Amasa Green* and others presented their petition to the board of commissioners of *Starke* county, for the location of a county road, "beginning at the bridge at *Piqua*; thence on the road to the *Pine* creek bridge; thence south-west to the south-west corner of section sixteen; thence on said line running west to the south side of *Jones's* farm; thence south-west until it runs one mile south; and thence on said section line until it strikes the county line between the counties of *Starke* and *Jasper*."

Viewers were appointed, who, at the *June* term, 1857, made report that they had viewed and laid out the road, &c., and that the same when opened would be of public utility.

Whereupon *Daggy* and others remonstrated against so much of the road as run through their lands west of the railroad, in *Railroad* township, in said county, alleging that the same, as viewed and laid out, would, when opened, greatly injure and damage their lands, &c.; and they pray that so much thereof as is located west of said railroad be rejected, &c.

The record avers that the board, after due deliberation, &c., confirmed the report of the viewers, and ordered the road to be opened, &c.

The remonstrators appealed. In the Circuit Court, they moved to dismiss the petition; but their motion was overruled. Thereupon the cause was submitted to a jury, who, after hearing the evidence, &c., and having retired, &c., returned the following verdict:

"We, the jury, find that the proposed highway, as described in the petition, is of public utility; and that said *Daggy* has sustained no damage. We further find that the petitioners are not freeholders, six of whom reside in the immediate neighborhood of the proposed highway.



And further, we find that *James Tucker, Edward Tucker,* and *George Green*, the viewers, who made the report, &c., are owners of land along the proposed highway.”

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And the Court, having refused a new trial, adjudged that the proposed highway is of public utility; that the remonstrators, by reason of it, have sustained no damage; and that the same be established and opened in accordance with the description thereof in the petition; and that this order be certified to the board, &c.

By an act relative to the opening, &c., of highways, it is provided that—

1. Any person may have a highway laid out in any township, by the petition of twelve freeholders residing therein, to the trustees of such township.

2. Whenever twelve freeholders of the county, six of whom shall reside in the immediate neighborhood of the highway proposed to be located, &c., shall petition the board of commissioners, &c., for the location, &c., running into more than one township; such board, if they shall be satisfied, &c., shall appoint three persons to view such highway.

3. No person owning lands along any proposed highway, shall be competent to act as a viewer or reviewer thereof. 1 R. S. pp. 310, 313, 316, §§ 15, 27, 46.

The petition, as we have seen, fails to show that the proposed highway, when located, would run “into more than one township;” hence, it is insisted that, upon the case which it presents, the commissioners had no authority to act; and, consequently, the appeal was not triable in the Circuit Court.

This position seems to be correct. The commissioners have no right to proceed in any case, unless, as presented, it rests within the statute giving them jurisdiction. 10 Ind. R. 358. Tested by this rule, the petition before us is obviously defective; because it fails to aver that the proposed highway ran into more than one township. Without such averment, the commissioners had no power to appoint the viewers.

There is, however, another reason why these proceed-



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ings cannot be supported. It appears affirmatively that the persons appointed as viewers owned real estate along the proposed highway, and were, therefore, incompetent to discharge the duties of such appointment. Section 46, *supra*. It follows that their report was a nullity; and, in sequence, the order of the Circuit Court erroneous.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*A. Daggy*, for the appellants.

*J. O'Brian*, for the appellees.

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12 306  
137 238

An agent employed to drive stock from one place to another, has no power in virtue of such employment to sell the stock, in case it become foot-sore and unable to travel; and in case of a sale under such circumstances, the owner may recover his property by action against the purchaser.

Where the principal has never held the agent out as having a general authority, it is the duty of one purchasing from him to inquire as to the extent of his authority; and, if he purchase without inquiry, he trusts the agent and not the principal.

Monday,  
May 30.

APPEAL from the *Hamilton* Court of Common Pleas.

HANNA, J.—This was an action to recover a specific article of personal property, to-wit, one bull, and damages.

The defendant answered in three paragraphs—

1. A general denial.
2. Property in himself.
3. Property in one *Chenoworth*.

The plaintiff replied, denying, &c.

Trial; verdict for plaintiff; motion for new trial overruled; judgment on the verdict.

The questions presented by the brief of the appellant arise upon the instructions given and those refused, and involve but two points.

The facts upon which the instructions were based were, in substance, that *Martin*, of *Darke* county, *Ohio*, con-



tracted to *Chenoworth*, of *Vermillion* county, *Indiana*, one bull, for 50 dollars, of which sum 20 dollars was paid, and the balance was to be paid upon the delivery of the property to the purchaser, at his farm, by the said *Martin*. *Martin*, at his expense, employed one *Wisner* to drive the animal to the purchaser; he drove him part of the way, and, upon the animal and himself becoming foot-sore, sold him to *Reitz*, who, upon demand made, refused to surrender him.

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REITZ  
v.  
MARTIN.

Upon these facts, the questions arise as to the power of *Wisner* to sell, and the right of *Martin* to sue.

The first instruction asked and refused, assumed that a special agent could sell the property of the principal, although such act was not within the line of his specific duties, in case of emergency; and that it was a question for the jury whether *Wisner*, under the circumstances, exercised a reasonable discretion in disposing of the property. The instruction given upon this point was, in substance, that if an agent, to whom property was intrusted for a particular purpose, should dispose of the same in a manner not within the scope of his authority, the principal would not be bound by the act; so, if *Wisner* did not act within his instructions and the scope of his employment, and the plaintiff had not affirmed his acts, he, the plaintiff, would not be concluded thereby.

The fourth instruction, asked and refused, assumed, in effect, that if the agent, or the property, or both, became, during the journey, in a condition unable to proceed farther, he was then authorized to sell the property; and that the principal was civilly liable for the wrongful acts of the agent, in the course of his employment; and, therefore, if the sale was wrongful, still it was legal, and vested the title in the purchaser, &c.

The authorities referred to by the appellant, in support of the instructions asked, and which were refused, are certain sections of Story on Agency, which we have examined, and find them to treat of the powers of a master of a ship, and the rights of certain mercantile agents. We are not able to perceive the applicability of the authorities



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1859.

REITS  
v.  
MARTIN.

cited to the case at bar. It has been decided that agents, in ordinary transactions, have not the powers of masters of vessels. See *Hawtayne v. Bourne*, 7 M. and W. 597, where it is decided that there is no implied authority in an agent, conducting the general business of a mine, to borrow money in a case of necessity. Smith's Mercantile Law, p. 117. Yet the master of a ship, under his general power as agent for the owners, is authorized to borrow money, &c. *Id.* 117.

The common-law rule as to the power of the agent to bind his principal, by a sale of the property, appears to have been, that the purchase must have been in market overt, and without knowledge by the purchaser of the agency of the seller, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions. *Id.* 118.

The general rule is, that the authority of the agent, of whatever description, must be strictly pursued; otherwise, the principal, if his agent be a special one, will not be bound. *Id.* 115. And if the principal has never held the agent out as having any general authority whatever in the premises, it is the duty of one purchasing from him to inquire; and if he trusts without inquiry, he trusts to the good faith of the agent and not of the principal. Story on Agency, § 133.—*Schimmelpennick v. Bayard*, 1 Pet. 290.—*Pursley v. Morrison*, 7 Ind. R. 358.

It is clear to our minds, that the first inquiry—the right of the agent to sell—should be decided in the negative. We do not see any error in the rulings of the Court upon the question of instructions upon this point.

We are equally clear that the second point is against the appellant.

It is insisted that, under a proper legal interpretation of the contract, as proved, the title to the property passed to the purchaser, *Chenoworth*.

Without stopping to inquire whether that proposition is right or wrong, it is manifest that the right of possession remained in the seller, *Martin*, until the payment of



the purchase-money to him by the purchaser. 1 Pars. on Cont. 441. May Term,  
1859.

*Per Curiam*.—The judgment is affirmed with costs.

*D. Moss*, for the appellant.

*D. C. Chipman*, for the appellee.

WILLIAMS  
v.  
DEWITT.

### WILLIAMS v. DEWITT.

Where a defendant pleads a set-off, the plaintiff may, without waiting for evidence in support of it, prove, in the first instance, that it had been settled by an arbitration between himself and the defendant; but, after having gone into such proof, he will not be allowed, at the close of the defendant's evidence, to give additional proof of such settlement.

A witness having stated his recollection of the facts, must not state his understanding and belief from such facts.

Where it appears that the items of an account, claimed to be settled by arbitration, were reduced to writing, parol evidence of its contents is not admissible until some valid reason is shown for the failure to produce the writing.

### APPEAL from the *Delaware* Circuit Court.

*Monday,  
May 30.*

WORDEN, J.—Suit by the appellee against the appellant, before a justice of the peace, from whose judgment the cause was appealed to the Circuit Court. The action was upon an account for 17 dollars. The defendant filed an account as a set-off, amounting, after deducting credits, to 88 dollars, 65 cents. On the trial in the Circuit Court, the plaintiff recovered judgment on the verdict of a jury, for six dollars, over a motion for a new trial.

By a bill of exceptions, it appears that upon the trial of the cause, the plaintiff, having offered his evidence to support the claim for which the suit was brought, proceeded to offer evidence showing that the defendant's set-off had been settled by an arbitration between the parties. To this evidence the defendant objected, on the ground, among others, "that the plaintiff had no right to attempt to defeat by evidence the defendant's set-off, until the defendant



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1859.

WILLIAMS  
v.  
DEWITT.

had had an opportunity of establishing it, the defendant being entitled to commence the evidence for the defense."

The objection was overruled, and the witnesses were examined by the plaintiff, whose testimony tended to establish such arbitration and settlement of the account constituting the defendant's offset.

We cannot say that this ruling of the Court was erroneous, as much depends upon the discretion of the Court below as to the order of the introduction of evidence. It would undoubtedly be entirely proper, in such case, for the plaintiff to confine himself, in the first place, to proof of his account; the defendant then being at liberty to offer his evidence to defeat the plaintiff's account, and also establish his offset; the plaintiff then having the right to rebut the defendant's evidence offered to defeat his account, and also to offer his evidence to defeat the defendant's offset; the defendant then being permitted to rebut the plaintiff's evidence attacking his offset. But we do not think, under the authorities, that it is erroneous to permit the plaintiff, in the first instance, to offer evidence to defeat the offset.

After the defendant had introduced his testimony, the plaintiff called another witness, and offered to prove by him facts in relation to the arbitration, concerning which other witnesses were examined by him in his original testimony. To this testimony the defendant objected, because, having gone into the same matters in his original examination, he had no right to travel over the same ground again, as it would give him an undue advantage in the case, having no right to introduce anything but rebutting evidence. The objection was overruled, and the testimony admitted, and exception taken.

We are of opinion that this objection was well taken, and that the Court erred in overruling it.

The case of *Brown v. Murray*, 21 E. C. L. 21, is in point. That was an action for a libel. Pleas, general issue and justification. The plaintiff having proven the libel, called a witness to disprove certain facts alleged in the justification. After the defendant had introduced his evidence in



support of his justification, and had closed his evidence, the plaintiff called another witness, and proposed to disprove other facts stated in the justification. But it was held by the Court that the plaintiff might, if he saw fit, content himself with proof of the libel, and leave it to the defendant to make out his justification, and then, in reply, rebut the evidence produced by the defendant; but if the plaintiff in the outset thinks fit to call any evidence to repel the justification, he ought to go through with all the evidence he proposes to give for that purpose; and that he would not be permitted to give further evidence in reply.

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1859.

WILLIAMS  
v.  
DEWITT.

So in the case at bar; as the plaintiff chose, in the first instance, to go into evidence to defeat the defendant's offset, he should then have introduced all his evidence for that purpose, and not cut it up by offering a part then, and a part afterwards.

On the examination of one of the plaintiff's witnesses, the witness having stated his recollection of the facts in reference to the arbitration, he was asked to state from what he had heard the parties say, and from their acts, what his belief and understanding was, as to whether the parties made a settlement of all matters in difference between them. To this question the defendant objected, on the ground that the witness had no right to state his understanding or belief, or draw inferences, but must state facts; but the objection was overruled, and exception taken, and the witness gave to the jury his understanding and belief in the premises.

It is a general rule, that a witness can speak only to such facts as are within his own knowledge, although he is not required to speak with such expression of certainty as to exclude all doubt in his mind. And on any subject to which a witness may testify, if he has any recollection at all of the fact, he may express it as it lies in his memory, of which the jury will judge. 1 Greenl. Ev., § 440.

We think the witness might testify to the best of his recollection as to what the parties said and did; but it was for the jury to determine whether, from what they so said and did, the inference was fairly deducible that the parties



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WILLIAMS  
V.  
DEWITT.

Exception was taken to another ruling as to the admission of testimony. The witness proving the arbitration, stated that the only charges presented to the arbitrators by *Williams* against *Dewitt* were a written lease from *Williams* to *Dewitt*, and breaches therein, and an account of various items in writing amounting to about 40 dollars; and that the arbitrators took into consideration no account of said *Williams* which was not in writing. The defendant objected to the witness stating orally what items of the defendant's account were thus settled, without producing the account thus laid before the arbitrators, or accounting for its absence, on the ground that the account was the best evidence, and the only evidence of what was arbitrated and settled, if anything; but the objection was overruled, and the witness permitted to testify what items were arbitrated and settled, without any excuse for the absence of the written account.

We are of opinion that in this ruling the Court also erred. The rule requiring the production of the best evidence of which the case, in its nature, is susceptible, applies. The parties submit, in writing, certain matters in dispute between them, to arbitrators. Afterwards, a controversy arises between them as to what matters were thus arbitrated. The best evidence is undoubtedly the writing containing the submission. Supposing the controversy had been whether the items of the defendant's account had been previously recovered in an action between the parties, the record containing the bill of particulars, if one was filed, would unquestionably be the primary evidence to be resorted to. Although the law may not require the matters submitted to arbitrators to be reduced to writing, yet when thus put in writing, parol evidence of what was thus arbitrated becomes secondary in its character.

Some exceptions were taken to the ruling of the Court in giving and refusing instructions; but we have not ex-



amined them carefully, as the judgment must be reversed for the reasons above given.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. March*, for the appellant.

*J. S. Buckles*, for the appellee.

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1859.

KUNTZ  
v.  
BRIGHT.

### KUNTZ and Another v. BRIGHT.

*B.* brought an action of attachment against the steamboat *Crystal Palace*, and her master, *K.*, came in and filed an undertaking, with *F.* as surety, for the payment of any judgment *B.* might recover. *F.* was in no other way a party to the suit. The Court rendered judgment against *K.* and *F.*, who appealed. *Held*, that the judgment against *F.* was erroneous; and that, inasmuch as he was not a party to the suit, and had no notice of the proceedings therein, he could avail himself of the error without having excepted in the Court below.

### APPEAL from the *Floyd* Circuit Court.

Monday,  
May 30.

*WORDEN, J.*—This was an action commenced by *Bright* against the steamboat *Crystal Palace*, under the provisions of the statute to enforce “liens on boats and other water-crafts” (2 R. S. p. 183), to recover damages for an injury done to the steamboat *Hoosier State*, of which *Bright* was the owner, by being carelessly and negligently run into by the *Crystal Palace*. *William J. Kuntz*, as master of the *Crystal Palace*, came in and filed an undertaking for the payment of the judgment that might be rendered, with *Hugh C. Funk* as his surety, and the boat was released from the attachment. For answer, a general denial was put in, and the cause was tried by the Court. There was a finding for the plaintiff below, on which judgment was rendered, overruling a motion for a new trial. A bill of exceptions sets out the evidence, from which we see no cause to disturb the finding. There is some conflict in the evidence, and in some respects it is, perhaps,



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KUNTZ  
v.  
BRIGHT.

irreconcilable; but on the whole, we are of opinion that the finding is sufficiently sustained by the evidence.

The Court, upon its finding, rendered judgment in favor of the plaintiff, against both *Kuntz* and *Funk*, to be levied first of the property of *Kuntz*, and in default of property sufficient, &c., to be levied of the property of *Funk*.

The judgment against *Kuntz*, instead of the steamboat, is proper, he having come in as master, in pursuance of the statute, and procured the release of the boat. *Jones v. Gresham*, 6 Blackf. 291.—*Brayton v. Freese*, 1 Ind. R. 121.—*Lane v. Leet*, 2 Ind. R. 535. But the judgment against *Funk*, we think, was wrong. No process was served on him, and he did not make himself a party to the proceedings. No process was necessary to be served on *Kuntz*, as he made himself a party by coming in as master and procuring the release of the boat. *Brayton v. Freese*, *supra*. But *Funk* can well say he has had no "day in Court." His undertaking was merely as the surety of *Kuntz*, and did not make him a party to the proceedings. This point, also, seems to be settled by the case last cited.

It is suggested that no injury is done *Funk* by the rendition of judgment against him, as the proceedings against *Kuntz* are conclusive as to the amount of his liability, and that the course pursued is proper, as avoiding circuity of action. The argument assumes that *Funk* is, by some means, concluded, as to the fact of having executed the undertaking, and being liable thereon.

There is nothing in the record showing that, were he sued upon the undertaking, he would be precluded from controverting its execution by him, or his liability thereon. But it is said, that as no exception was taken to the rendition of judgment against *Funk*, it is now too late to raise the point. This might be correct if *Funk* had been made a party, and therefore required to notice the proceedings in the cause; but not having been a party, and judgment having been rendered against him, he can now avail himself of the error. If his undertaking should be forfeited, the necessary steps can be taken to hold him responsible.

The undertaking of *Funk*, as the surety of *Kuntz*, not



making him a necessary, nor, indeed, a proper party to this action, the judgment may be reversed as to him, without affecting its validity as to *Kuntz*. This error is separately assigned by *Funk*, and must prevail.

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LITTLER  
v.  
LAMB.

*Per Curiam*.—The judgment, as against *Funk*, is reversed with costs; and as against *Kuntz* it is affirmed.

*R. Crawford*, for the appellants.

*T. L. Smith* and *W. T. Otto*, for the appellees.

LITTLER and Another v. LAMB.

APPEAL from the *Fontain* Court of Common Pleas.

Monday,  
May 30.

*Per Curiam*.—Suit upon a promissory note executed by *Elijah Littler* and *Jackson King* to *Barnabas Lamb*, and by him assigned to *Jacob Lamb*, the plaintiff. The note is for 1,000 dollars, due ten days after date.

Answer, setting up that at the time *Littler* and *King* gave the note to *Barnabas Lamb*, *Littler* held a note for 1,000 dollars against said *Barnabas*; that *King* is simply a surety on the note to *Barnabas*, and hence, the defendants claim that it is a set-off to the note in suit. This note held by *Littler*, was assigned to him by *E. C. Sumner*, a few days before he gave the note in question to *Barnabas Lamb*.

Replication, that the consideration for the note made payable to *Barnabas*, was cattle sold by *Jacob Lamb*, to *Littler*; that the note was made payable to *Barnabas* by fraud; and that *Littler*, in purchasing the cattle, was acting secretly for *Sumner*, and resorted to the mode adopted in giving the note to *Barnabas*, for *Jacob's* cattle, at *Sumner's* instigation, as a means of obtaining the payment of *Sumner's* note.

The questions to be tried were of fact, alone, and related to the facts of beneficial interest, and fraud.

The cause was first submitted to a jury, who failed to



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THE INDI-  
ANA, & C.,  
RAILWAY Co.  
V.  
CAVETT.

agree, and were discharged. It was subsequently tried by the Court, who rejected the set-off, and found for the plaintiff upon the note sued on.

There is evidence tending to sustain the finding of the Court. The credibility of the witnesses could be estimated by the Court below more accurately than it can be by this Court.

The judgment is affirmed with 1 per cent. damages and costs.

*J. Ristine and D. W. Voorhees*, for the appellant.

*J. A. Rice*, for the appellee.

THE INDIANA AND ILLINOIS CENTRAL RAILWAY COMPANY  
v. CAVETT.

Monday;  
May 30.

APPEAL from the *Hendricks* Circuit Court.

*Per Curiam*.—Suit upon subscriptions of stock to the amount of 1,500 dollars, with interest on the same.

Answers of payment and set-off. Trial by jury; verdict for plaintiffs for over 300 dollars, and judgment on the verdict.

The plaintiffs appeal on the ground that the verdict and judgment were for too small a sum.

The evidence tends to prove a payment of 1,000 dollars in money, and some 1,100 or 1,200 dollars in other stocks, which, with the 300 dollar judgment, would seem to be enough for 1,500 dollars of stock in the *Indiana and Illinois Central Railway*.

It is claimed that the stock payments mentioned, were not upon the subscription sued on, but for a new issue of stock in the *Indiana and Illinois Central Railway Company*. That was a question for the jury.

The judgment is affirmed. Costs against plaintiffs in this Court.

*C. C. Nave and J. Witherow*, for the appellant.

*H. C. Newcomb and J. S. Turkington* for the appellee.



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12	317
170	540

SHREWSBURY and Another v. SMITH and Another.

APPEAL from the *Johnson* Court of Common Pleas.

*Per Curiam*.—The record contains a bill of exceptions, which, after setting forth the evidence given on the trial, contains this averment: "And upon this evidence the Court found for the defendants, and the plaintiffs moved in arrest of judgment and for a new trial, which the Court overrules, to which rulings the plaintiffs except." *Tuesday,*  
*May 31.*

The only error assigned, relates to the finding of the Court upon the evidence. The appellees, however, insist that that assigned error is not available in this Court, because the motion in arrest precedes that for a new trial. The position thus assumed is well taken. We have often decided that the motion in arrest of judgment, preceding the motion for a new trial, is an affirmation of the verdict, and precludes that for the new trial. 4 Ind. R. 243, 652. —6 *id.* 453, 466.—7 *id.* 406, 706. It follows that the effect of the motion in arrest, in this instance, is to affirm the finding of the Court.

The judgment is affirmed with costs.

*F. M. Finch*, for the appellants.

*G. M. Overstreet* and *A. B. Hunter*, for the appellees.

McCole v. WYNNE and Others.—Two Cases.

APPEAL from the *Hamilton* Court of Common Pleas. *Tuesday,*  
*May 31.*

*Per Curiam*.—The appellees, who were the plaintiffs, sued *McCole* on a promissory note, for the payment of 541 dollars. Issues, properly made, were submitted to the Court for trial. Finding for the plaintiff. Each party moved for a new trial, and each motion was overruled. Judgment on the finding of the Court. The defendant appeals to this Court, and assigns for error the refusal to



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NAVE  
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grant him a new trial. This being the only error of which the appellant complains, and the evidence given on the trial not being in the record, the judgment must be affirmed; because we have often decided that when the evidence is not made a part of the record, the opinion of the Court below in overruling a motion for a new trial, will not be reviewed. 8 Ind. R. 470, 499.—11 *id.* 260.

The judgment is affirmed with 6 per cent. damages and costs.

*D. Moss*, for the appellant.

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NAVE v. BAIRD.

NAVE v. LANE and Another.

In a difficult case, an attorney should advise his client to the best of his judgment; but if the client is unwilling to follow his advice, it is safer for the attorney to follow the client's instructions, so far as the rules of law may permit.

But if the attorney does not do so, and the client sues for damages, he must show, presumptively, that he was injured by the course taken by the attorney, in order to recover more than nominal damages.

A second application for a change of venue will scarcely be granted upon the application of the same party.

As a general rule, an attorney cannot, as a witness against his client, disclose confidential communications; but the rule does not apply where the client sues the attorney for disobeying instructions alleged to have been given in such consultations, and for unskillfully managing a cause upon information given by the client in them.

Tuesday,  
May 31.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—*Baird* sued *Nave* upon a promissory note for 200 dollars.

Answer by way of counter-claim, alleging that the note was given in consideration that said *Baird*, an attorney at law, should attend to a certain cause then pending against said *Nave* in the *Fountain* Circuit Court; that *Baird* did not, in a skillful manner, conduct the defense of the cause,



and refused to obey the instructions of his client in these particulars, viz.: that he refused to apply for a change of venue therein, and refused to put in the testimony of certain witnesses. It is further alleged that judgment went against *Nave*, whereby he was damaged 3,000 dollars, which amount, he claims, should be adjudged in his favor against *Baird*.

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NAVE  
v.  
BAIRD.

A jury was called to try the issue made. Verdict for the plaintiff, upon which the Court rendered judgment.

It is often very difficult for an attorney to determine, in a difficult, critical case, the proper steps to be taken in its prosecution or defense. A small circumstance, a slight injudicious move, may have an extremely prejudicial influence. A change of venue, injudiciously taken, may be construed to imply a consciousness of a bad cause; and an unsuccessful attempt to prove facts affecting prejudicially the character of the opposite party, or any of his witnesses, may so recoil as to turn the scale, in a doubtful case, against the party attempting it. In such cases, it is the duty of the attorney to advise his client to the best of his judgment; and it is generally the wiser course for the client to act upon the advice so given; but if he is unwilling to do so, it is safer for the attorney to follow the instructions of his client, so far as the rules of law may permit. But if he does not do so, and the client sues for damages, it will devolve upon him to show, presumptively, that he was injured by the course pursued by the attorney, in order to recover more, at least, than nominal damages.

In this case, it is not proved that the client positively insisted upon a change of venue, though he advised it. Nor is it shown that a case existed in which he could have obtained one. It has been decided that a second application for a change of venue will scarcely be tolerated (*Millison v. Holmes*, 1 Ind. R. 45); and, upon the same principle, we think, a second change would scarcely be granted upon the application of the same party; while repeated application would place an unfavorable aspect upon the party's cause.

The evidence which the attorney refused to put into the



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SLAVIN  
v.  
FOSTER.

cause, is incorporated in this record. It justifies the course of the attorney; it entirely fails to prove the point to which it was to be offered, and is of a character highly calculated to prejudice the cause of the party who should introduce it.

There is another point in the case. Associated with Mr. *Baird*, in the defense, were Messrs. *Lane* and *Willson*, of *Crawfordsville*. They were present at the consultations between Mr. *Nave* and Mr. *Baird*; and Mr. *Baird*, on the trial of this cause, to rebut testimony introduced by Mr. *Nave*, as to what transpired in those consultations, offered Mr. *Willson* as a witness. Mr. *Nave* objected to his testifying, on the ground that he was not competent to disclose confidential communications.

As a general proposition, an attorney cannot, as a witness against his client, disclose such communications. But the rule does not apply where the client sues the attorney for disobeying instructions alleged to have been given in such consultations, and for unskillfully managing a cause upon information given to him by his client in them.

Upon the whole we see no error in the case.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*M. Nave*, in person.

*S. C. Willson* and *J. E. McDonald*, for the appellees.

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SLAVIN and Another v. FOSTER and Another.

Tuesday,  
May 31.

APPEAL from the *Grant* Circuit Court.

*Per Curiam*.—This was an action to set aside a sheriff's sale. The appellants were the plaintiffs below, and the appellees the defendants. The cause was tried by the Court, who found for the defendants, and, having refused a new trial, rendered judgment, &c.

The evidence is in the record, and the decision of the



cause turns exclusively upon the evidence. We have examined it carefully, and are of opinion that its weight fully sustains the finding of the Court.

The judgment is affirmed with costs.

*J. Brownlee* and *R. T. St. John*, for the appellants.

*H. D. Thompson* and *A. Steele*, for the appellees.

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ABNET  
v.  
ABNET.

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ABNET, Administrator, v. ABNET.

APPEAL from the *Adams* Court of Common Pleas. *Tuesday, May 31.*

*Per Curiam*.—This was a suit by the administrator of *Jacob Abnet* against *Henry Abnet*, upon a written agreement, by which *Henry* had agreed to support *Jacob* and his wife, in consideration that *Jacob* devised his farm to *Henry*. It was alleged for breach that *Henry* failed to support *Jacob* and his wife.

*Henry* answered, that after the making of the agreement sued on, the parties thereto made a new agreement, which was to take the place of the former, by which he was to be a tenant upon the farm upon certain terms, rendering to *Jacob* a certain share of the produce of it.

Replication in denial.

Trial by jury; judgment for the defendant.

The evidence is upon the record.

Without stating other grounds upon which we might be compelled to affirm the judgment below, it is sufficient to state that the evidence fully sustained the issue made on the part of the defendant.

It is proved that *Jacob* and his wife resided on the farm with *Henry*, and were more than supported from it; that the crops raised on it were annually divided; that *Jacob* had a handsome surplus on hand at his death; and that he lived independently. He worked on the farm, but of his free choice, and, doubtless, for his physical comfort and health.



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1859.

THOMAS  
v.  
WINTERS.

The judgment is affirmed with costs.  
*W. March*, for the appellant.

MITCHELL v. WALSER.

Tuesday,  
May 31.

APPEAL from the *Decatur* Court of Common Pleas.  
*Per Curiam*.—Suit upon an account. Answer. Issue.  
Trial. Judgment for the plaintiff. There is no bill of exceptions in the record. All instructions refused are presumed not to have been applicable to the case made by the evidence. A state of facts might have been shown rendering those given proper. Those given by the Court, of its own motion, were not numbered; but it does not appear that the Court was requested to number them. 2 R. S. p. 110.

The judgment is affirmed with 10 per cent. damages and costs.

*J. S. Scobey* and *W. Cumback*, for the appellant.

*J. Gavin* and *O. B. Hord*, for the appellee.

THOMAS and Others v. WINTERS and Others.

118	300
12	327
144	53

Contract as follows: "*Calumet, January 1, 1856. I, E. H. Johnson, have this day bought of V. Thomas & Co. two steers, for which I agree to deliver them, at their cooper-shop, at Calumet, eight thousand and four hundred packing barrel staves, two hundred pieces of heading to eight hundred staves, the said staves to be merchantable; all of said staves to be delivered between now and the first day of March next. And the said Thomases hold the said steers as their property until the delivery of said staves. [Signed] E. H. Johnson.*" Held, that this instrument does not evidence a sale to Johnson transferring to him the title to the cattle.

The Court instructed the jury that, "An agreement between buyer and seller, at the time of a sale, that the latter may resume the possession of the goods if the price be not duly paid, is a personal contract, binding on the buyer,



but will not authorize the seller to resume the possession of the goods, if the buyer has sold them, or if they, by his decease, have passed to his legal representatives." *Held*, that this is the law, as applicable to an absolute sale which passes title—not as applicable to a conditional sale.

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1859.

THOMAS  
v.  
WINTERS.

APPEAL from the *Porter* Court of Common Pleas.

Tuesday,  
May 31.

PERKINS, J.—Suit to recover possession of a yoke of cattle. The suit was commenced before a justice of the peace. Judgment in the Court of Common Pleas for the defendants.

On the trial, the plaintiffs gave in evidence a written instrument, reading as follows:

"*Calumet*, January 1, 1856. I, *E. H. Johnson*, have this day bought of *V. Thomas & Co.* two steers, for which I agree to deliver them, at their cooper-shop, at *Calumet*, eight thousand and four hundred packing barrel staves, two hundred pieces of heading to eight hundred staves, the said staves to be merchantable; all of said staves to be delivered between now and the first day of *March* next. And the said *Thomas* hold the said steers as their property until the delivery of said staves. [Signed]

*E. H. Johnson.*"

The plaintiffs further proved that *Johnson* took possession of the steers, used them awhile, and then sold them; also, that they had demanded the steers of the purchaser. They proved that the staves, &c., had not been delivered pursuant to the contract, nor at all.

The first question in the case arises upon the construction of the above copied written instrument. Does it evidence a sale to *Johnson* which transferred to him the title to the steers?

We are satisfied that it does not. It is plain, from the whole instrument, that such was not the intention of the parties. It was a conditional sale, to become absolute on payment of the consideration. The authorities are in point. *Chit. on Cont.* (Perk. ed.) 391, note 2. *Barrett v. Pritchard*, 2 Pick. 512, is very similar to the case at bar. So are *Herring v. Willard*, 2 Sandf. 418; *Strong v. Taylor*, 2 Hill, 326; and *Brewster v. Baker*, 20 Barb. 364.

The title, then, not having passed from *Thomas & Co.*,



May Term, 1859. was not transferred by the sale of the steers by *Johnson* to the defendants. If the steers had been stolen or borrowed

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v.  
*Williams.* from *Thomas & Co.*, no one would doubt on this point. The case made does not differ in principle.

The Court instructed the jury that, "An agreement between buyer and seller, at the time of a sale, that the latter may resume the possession of the goods if the price be not duly paid, is a personal contract, binding on the buyer, but will not authorize the seller to resume the possession of the goods, if the buyer has sold them, or if they, by his decease, have passed to his legal representatives."

This is the law, as applicable to an absolute sale which passes title—not as applicable to a conditional sale like the one in the case at bar. See *Chissom v. Hawkins*, 11 Ind. R. 316.

No questions of estoppel or fraud which might vary the result of a cause arise in this case. See *King v. Wilkins*, 11 Ind. R. 347. *Quære*, as to the last point decided, or *dictum*, in that case.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

*J. Bradley*, for the appellants.

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### HORNE and Another v. WILLIAMS.\*

A party may inform his witness of the testimony adduced by the opposite party, if the Court has not ordered witnesses not to converse with the parties; and if the record does not show such an order, the Supreme Court cannot presume that it was made.

Objections to particular testimony, though well taken, are no ground for the rejection of a witness altogether; and if a witness be rejected generally upon

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\*A petition for a rehearing of this case was filed on the 12th of June, and overruled on the 29th of the same month.



such objections, the error is sufficient to reverse the judgment; and it need not be shown that the witness was introduced to prove something pertinent to the issue.

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1859.

HORNE  
v.  
WILLIAMS.

A medical witness, in giving his opinion as an expert, cannot give the particulars of his practice not connected with the case; but if such testimony go to the jury without objection, testimony to contradict, or show the want of capacity and skill on the part of the witness, is not admissible. If such collateral matters be inquired of on cross-examination, the answers of the witness must be taken, and other witnesses cannot be called to contradict him.

A witness called as an expert, who had previously heard the testimony of another expert, was asked if he concurred in the opinion of the other, and if not, wherein he differed. Objection sustained. *Held*, that this was not error.

### APPEAL from the *Delaware* Circuit Court.

Tuesday,  
May 31.

WORDEN, J.—This was an action by the appellee against the appellants, to recover damages for carelessness, negligence, and unskillfulness on the part of the defendants, as surgeons, in reducing and attending to a fractured limb of the plaintiff. Verdict and judgment for the plaintiff, a motion for a new trial, made by the defendants, being overruled, and exceptions properly taken.

From the bill of exceptions, it appears that on the trial the plaintiff had introduced and examined as a witness, one *John C. Helm*, a physician, from whom she elicited professional opinions. In his testimony he spoke of a case of a fractured leg of *Howell's* boy, which he had treated. The plaintiff having closed her testimony, the defendants, in order to sustain their defense, introduced *Mrs. Howell*, a competent witness, who testified as follows, in answer to questions propounded to her by the plaintiff: "I was subpoenaed yestereve. I had a conversation with *Dr. Slack*; talked about my son; he told me *Dr. Helm* had been talking in Court." Thereupon the plaintiff objected to the witness's testifying, on the ground that she had had conversation with defendants in regard to the testimony, and had been informed by *Dr. Slack* what *Helm* had testified to, and also on the ground that it was collateral, and that "they had no right to impeach a medical witness by the opinion of one who was not an expert, and not a doctor."



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V.  
WILLIAMS.

The Court sustained the objection, and excluded the witness, and the defendants excepted.

It will be observed that the defendants offered this witness in order to sustain their defense; that is, she was offered as a witness generally, and the plaintiff having elicited from her the facts above indicated, objected to her testifying, and this objection was sustained. We will examine the two grounds of objection. The first is, that she had had a conversation with the defendants in regard to the testimony, and had been informed by Dr. *Slack* what *Helm* testified to. This objection, it will be seen, goes further than the facts disclosed, on which it is predicated. Mrs. *Howell* does not say that Dr. *Slack* informed her what *Helm* had testified to. She says simply that she had a conversation with him; that they talked about her son; and that he said Dr. *Helm* had been talking in Court. But supposing Dr. *Slack* informed the witness what Dr. *Helm* had testified to, we know of no rule of law by which he would thereby be deprived of the testimony of the witness.

A suitor has a right to confer with his witnesses and ascertain from them what facts are within their knowledge; and if, in the progress of the trial, he inform them of the testimony adduced by his adversary, we do not see how it would interfere, necessarily, with the due administration of justice, or work any wrong to the opposite party. But it is insisted by counsel that the ruling of the Court was right, as it had previously made an order separating the witnesses, and ordering them not to converse with the parties, and not to be informed by parties or counsel, what had been testified by previous witnesses. No such order, however, is shown, by the record, to have been made, and we cannot presume it to have been made, especially as the ruling of the Court does not purport to be based upon the ground that either the witness or the party had been guilty of a violation of an order of the Court in the premises.

Whether a witness can be excluded in any case for the



violation of a proper order of the Court for a separation of the witnesses, is a question that does not arise in the record, and therefore we do not decide it.

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HORNE  
v.  
WILLIAMS.

The other objection, that the testimony was "collateral," and that "they had no right to impeach a medical witness by the opinion of one who was not an expert," seems directed to the character of the testimony, rather than to the competency of the witness. We are not advised by the record what it was that was sought to be proven by the witness, and cannot determine whether the testimony was collateral or otherwise; nor are we advised whether the defendant sought to introduce the opinions of the witness. But these objections to particular testimony, if well taken, are no reason for excluding a witness altogether, as was done in this case. The witness was competent to answer proper and legal questions; and where that is the case, he should not be rejected generally. *Prather v. Lentz*, 6 Blackf. 244. "Where a witness is called to the stand who is competent to be sworn, and to testify to some matters, but who may not speak of other matters, it is not proper to object to his competency generally, and exclude him. It will not be presumed that an improper question will be asked him. It is by objecting to improper questions when asked, that a party can exclude improper evidence." *Wood v. Cohen*, 6 Ind. R. 455, note 2.

Here, no question had been asked of the witness by the defendants. They had introduced her, and the plaintiff had put certain questions, and elicited the answers named, whereupon the witness was rejected on the plaintiff's motion. In reference to the latter branch of the plaintiff's objection, the remarks in the note above cited, are peculiarly applicable.

We are of opinion that the Court erred in rejecting the witness.

That such an error should reverse the judgment, is established by the case of *Force v. Smith*, 1 Dana, 151, although the defendants did not state the particulars which they designed to prove by the witness. The Court state the question involved as follows, viz.:



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"If the Circuit Court refuse to permit a competent witness to be examined, should the judgment be reversed for that cause alone, unless it shall appear that the witness was offered to prove something pertinent to the issue."

In answer to the question thus propounded, the Court say: "Nor do we think that a party is bound to announce the fact which he intends to prove by a witness, before he shall have the right to swear and examine him. \* \* \* And as it does not appear that the rejected witness, who was competent, was offered for the purpose of proving an immaterial fact, the judgment of the Circuit Court should be reversed for error in refusing to permit the witness to be examined."

It further appears that "the defendants introduced competent witnesses, and offered to prove by them that all of the cases which Dr. *Helm* had treated, and to which he referred to illustrate his opinion, being seven in number, and which he said were perfect cures, were, all of them, two inches too short, and fully as short as the plaintiff's in this case."

This testimony, on the objection of the plaintiff, was excluded, and defendants excepted.

There was no error, in our opinion, in this ruling.

We think that although a medical witness, when called upon, may give a professional opinion as an expert, yet he cannot, either in answer to questions put by the party calling him, or as voluntary statements of his own, make evidence, the particulars of his own private practice, not connected with the case. If such particulars are inquired of by the party calling the witness, or volunteered by the witness himself, the opposite party, by making the objection, may have them excluded. But if such improper testimony be suffered to go to the jury without objection, the door is not thereby opened to the admission of testimony showing that the statements of the witness in relation to those particulars, are false or erroneous. Such testimony is entirely collateral. The party offering the witness, could not introduce it for the purpose of showing the capacity



or skill of the witness. If the opposite party, on cross-examination, for the purpose of testing the skill of the witness, or for any other purpose, inquire of the witness as to such collateral matters, he must take the answers of the witness, and cannot call others to contradict him. 1 Greenl. Ev. § 449.

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The defendants having introduced Dr. *Lomax*, and examined him as a professional witness, called Dr. *Winton*, who had heard the testimony of Dr. *Lomax*, and asked him if he concurred in the statements of Dr. *Lomax*, and if not, to state wherein he differed. The Court sustained an objection to this question, and exception was taken.

There is no error in this ruling. The mode sought to be adopted in eliciting the opinion of this witness, may have the merit of being expeditious, but it might be attended with some unfairness toward the witness himself, as well as to the opposite party. Witnesses called upon to testify professionally, should be left free to give their own individual opinion, upon the facts involved, unconnected with, and untrammelled by, the opinions of others who may have been examined.

The appellants complain of the refusal of the Court to give a certain charge to the jury asked by them; but we think the charge, in substance, covered by another which was given by the Court.

We have thus noticed all the errors complained of, and think there is none in the record, except the one first examined, for which the judgment will have to be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*D. Kilgore* and *J. S. Buckles*, for the appellants.

*T. J. Sample*, *C. B. Smith*, and *W. March*, for the appellee.



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HIZER v. THE STATE.

HIZER  
v.  
THE STATE.

A bet upon the result of an election, is within § 28, 2 R. S. p. 435.

An information is not bad for charging the time when an offense is alleged to have been committed, in figures.

The contingency of a bet upon the result of an election, is determined when the popular vote is cast; though there may be difficulty in proving the result until it is officially determined in the manner prescribed by the constitution and laws.

A. and B. were contesting candidates for an office for which an election was to be held on the 14th of *October*, 1856. Prior to the election, C. offered to purchase a hat of D. to be paid for in case A. should be elected at the election to be held on that day, and not otherwise. D. offered to sell the hat to C. and wait with him for payment until B. should be defeated, and upon these terms C. purchased.

*Held*, 1. That the parties had reference to the pending election.

2. That the contract was a wager.

A sale of goods, to be paid for or not, according as an election may result, is as much within the reason and policy of the law, as any other form of bet or wager upon the result of an election.

The Courts take notice judicially of the accession of the chief executive of the confederacy or state. Thus, where at the time of the trial of an information against a person for betting upon the election of a certain candidate for governor, that candidate had entered upon the duties of the office, in pursuance to the election upon the result of which the bet was made, it was *held*, that no proof of his election was necessary.

Tuesday,  
May 31.

APPEAL from the *Wayne* Court of Common Pleas.

WORDEN, J.—Information against the appellant, charging that on the 14th day of *October*, 1856, at, &c., the defendant unlawfully did win and take from one *William S. T. Morton* one hat, of the value of three dollars, by then and there unlawfully betting and wagering with the said *Morton* for the said hat, upon a certain wager, to-wit, the result of a certain election had and held on the 14th day of *October*, 1856, in the state of *Indiana*, for the election of governor of the state.

The information was filed on the 19th of *December*, 1856.

The defendant moved to quash the information upon the ground—

1. That it did not charge a violation of any of the penal laws of the state.



2. That it did not show that the contingency upon which the bet was made had been determined. May Term,  
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3. That at the time of filing the information, the result of the election had not been legally and officially determined. HIZER  
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THE STATE.

The information is predicated upon § 28, 2 R. S. p. 435, which provides that "Every person who shall, by playing or betting at or upon any game or wager, either lose or win any article of value, shall be fined not exceeding 50 dollars."

That the facts charged constitute an offense against the above provision, is settled by the case of *Parsons v. The State*, 2 Ind. R. 499.

An objection is made that the information charges in figures, only, the time when the offense is alleged to have been committed. This, under the statute of 1852, is sufficient. *Hampton v. The State*, 8 Ind. R. 336.

The second and third objections to the information seem to resolve themselves into one, which is, that the contingency upon which the hat was either to be won or lost, did not take place or transpire until the returns of the election were opened and published by the speaker of the House of Representatives, in the presence of both houses of the General Assembly, and that the hat could not be said to have been won until that event transpired.

Under the constitution and laws of the state, the general election for governor, &c., takes place on the second *Tuesday of October*. The clerk of the Circuit Court for each county makes two certified statements, under his seal, of the number of votes each candidate received in his county, one of which he transmits to the speaker of the House of Representatives of the next General Assembly, who opens and publishes such returns in the presence of both houses, and the person having the highest number of votes shall be elected. Constitution, art. 2, § 14, art. 5, §§ 4, 5.—1 R. S. p. 267, § 47.

We are of opinion, however, that the contingency transpired when the popular vote was cast. The subsequent steps are to be taken for the purpose of ascertaining legally



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the result of such popular vote. We think that a bet upon such election is either lost or won as soon as the vote is cast at the general election, as the contingency has then transpired, although it may not be known for some time in whose favor it has resulted.

No question as to the mode of proving which way the contingency resulted, arises in determining the validity of the information.

The Court below overruled the motion to quash, and we think correctly.

The defendant was tried by the Court, found guilty, and fined one dollar, and judgment was rendered against him, over a motion for a new trial.

By a bill of exceptions, it appears that on the trial, the state proved that on the 14th of *October*, 1856, the defendant went into the hat-store of *William S. T. Morton*, in the county of *Wayne*, and proposed to *Morton* to purchase from him a hat, to be paid for by the defendant, in case *Oliver P. Morton* should be elected governor, at the election held in *Indiana* on that day, but not otherwise. *Morton* replied that he was not selling hats on *Morton's* election, but that he would sell the defendant a hat, and wait with him for payment until *Willard* should be defeated. Defendant acceded to the terms, and purchased and received from *Morton* a hat of the value of three dollars, and agreed to pay for the same the sum of three dollars when *Willard* should be defeated.

There was testimony, excepted to by the defendant, that in the opinion of the witness, the parties referred to meant that the hat was to be paid for in case *Ashbel P. Willard* should be defeated for governor at the election on the said 14th of *October*, 1856, and not otherwise.

Setting aside the opinion of the witness as incompetent, we think there was sufficient evidence before the Court, in reference to this branch of the case, to sustain the finding.

Taking the whole statements of the parties together, it is evident that the parties had reference to the then pending election for governor, and that the hat was not to be



paid for unless *Willard* should be defeated for governor at said election.

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It is immaterial that the defendant was only to pay the value of the hat upon the contingency specified. The contract was a wager, as much as if the defendant were to have paid double its value on the contingency happening against him.

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THE STATE.

The case of *Parsons v. The State*, *supra*, and the authorities therein cited, we think, settle this point. There, the contract was for 65 dollars, payable when General *Taylor* should be elected president of the *United States*. The mare for which the money was to be paid, was proven by one witness to have been worth 50 dollars, and by another, 65 dollars, the full amount to be paid. In *Marean v. Longley*, 21 Maine R. 26, the note payable when *Van Buren* should be elected president, was given for the estimated value of the horse sold. And in *Trammell v. Gordon*, 11 Ala. R. 656, the notes were for the value of the land. A sale of goods, to be paid for or not, according as the election may result, is as much within the reason and policy of the law, as any other form of a bet or wager upon the result of an election, and is equally prohibited.

On the trial, there was no proof of the election of Governor *Willard*, except what was derived from newspapers and common rumor, and this was objected to as incompetent. A witness says that *Willard* was elected; but he derived his information solely from newspapers and common rumor; he knew nothing about it except that it was generally conceded that *Willard* was elected; had heard the defendant say nothing about it; and did not know whether the result of the election had been officially declared.

It is insisted that this evidence is entirely incompetent, and that there was nothing before the Court to show that the defendant had won the hat as charged in the information. Had the cause been tried before Governor *Willard's* official term had commenced, the question thus raised would have been entitled to serious consideration. It is extremely doubtful whether the testimony was at all legit-



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imate. As before stated, we think the hat was won when the popular vote was cast, although there might be difficulty in proving it until the result was officially determined in the manner prescribed by the constitution and laws of the state.

The cause was tried on the 14th day of *January*, 1857. Governor *Willard's* official term commenced on the second *Monday* of *January* of that year, it being the 12th day of the month, and he was the acting governor of the state at the time of the trial of the cause. Courts will take notice judicially of the accession of the chief executive of the nation or state. 1 Greenl. Ev. § 6. The Court noticing judicially that on the 12th of *January* of that year, Governor *Willard* was inducted into his office, and entered upon the discharge of its duties, the presumption would follow that he was duly elected, and we think no proof was necessary to make out this branch of the case. The evidence on this branch might have been stricken out, and still the Court would have been abundantly justified in its finding.

*Per Curiam*.—The judgment is affirmed with costs.  
*M. Wilson* and *C. H. Burchenal*, for the appellant.  
*J. Railsback*, for the state.

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### BRAY v. PEARSOLL and Another.

Suit upon a promissory note. Answer, that the note was in consideration of, and in part payment for, certain land described. *Held*, that this allegation is material, and must be proved; but strict proof is not required. .

If the maker of a promissory note take it up by executing to the same payee new notes for the same amount, the consideration of the new notes is the same as that of the old; and the maker may set up a failure of consideration in defense of a suit by an assignee upon the new notes.

*Tuesday,*  
*May 31.*

APPEAL from the *Boone* Court of Common Pleas.

DAVISON, J.—The appellees, who were the plaintiffs,



brought this action against *Bray*, who was the defendant, upon a promissory note for the payment of 90 dollars. The note bears date *May* the 16th, 1855, and was payable to one *George W. Gibson* at seven months. *Gibson*, on the 29th of the same month, assigned it to the plaintiffs.

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The defendant, in his answer, alleges that the note was executed by him to *Gibson* for and in consideration of, and as part payment for, a tract of land, describing it; that the vendor, at the time of the sale, represented to the defendant that the line on the north side of the tract ran so as to include a certain dwelling-house of the value of 300 dollars; that defendant, believing said representations to be true, purchased the land, and accepted a deed from one *William McLane*, in whom the title was, who, also, when he made the deed, represented said dwelling-house to be within the boundaries of the land. It is averred that the representations were false and fraudulent; that said line did not so run, &c., and that said house was not within the boundaries of the land sold and conveyed as aforesaid; and further, that defendant, having taken possession of said house under his purchase and deed, was afterwards ejected therefrom by one *Samuel Vest*, who held an older and paramount title, &c.

The plaintiffs replied by a general denial. The issues were submitted to a jury, who returned a verdict in this form: "We the jury, in accordance with the instructions of the Court, find for the plaintiffs 97 dollars and 36 cents—the amount of the note sued on with interest."

Motion for a new trial denied, and judgment, &c.

The facts, so far as they relate to questions arising in the record, are these: The legal title to the land, described in the complaint, was in *William McLane*, though it really belonged to his sons, *James* and *Selden McLane*. In *June*, 1854, *William McLane* sold the land described in the complaint, being authorized to do so, to *Bray*, the defendant, for 1,600 dollars, of which 1,200 dollars was paid in hand, and for the residue the defendant executed two promissory notes, each for the payment of 200 dollars, payable *December* 25, 1855. One of these notes, by the assent of the



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vendor and his sons, *James* and *Selden*, was made payable to *Gibson*, the assignor of the note in suit. At the time of the sale, the vendor pointed out to defendant certain lines, which he represented as the true boundaries of the land, and the boundaries thus pointed out included the dwelling-house mentioned in the complaint. The vendor, in pursuance of the sale, executed a deed to the defendant. In *May*, 1855, *Gibson*, being indebted to one *John Cole* 110 dollars, handed him, *Cole*, the 200 dollar note, stating that it was for a part of the purchase-money of said real estate, and a lien thereon. And *Cole*, by the directions of *Gibson*, called on defendant, and procured him to give, in lieu of the 200 dollars, two notes, viz., one for 110 dollars payable to him, *Cole*, and another for 90 dollars, payable to *Gibson*, on the 25th of *December*, 1855. The last note is the one on which this suit is founded. After this, in *February*, 1856, it was ascertained by actual survey that said dwelling-house was not within the boundaries pointed out by the vendor and set forth in the defendant's deed.

Various instructions were moved by the defendant, and refused by the Court; but the record shows that the decision turned solely upon the instructions given; hence, those refused will not be further noticed.

The Court instructed as follows:

"It is incumbent on the defendant to prove the material allegations in his answer. The allegation that the note sued on was given for the real estate described in the answer, is a material allegation, and he is compelled to prove it, in order to make out his defense; and there being no proof at all that said note was given for real estate as alleged, but that it was given for another note, the law is with the plaintiffs, and it is your duty to find for them. You will, therefore, find for the plaintiffs, and assess their damages at the amount of the note and interest," &c.

The answer says the note was given in consideration of, and in part payment for, the land described, &c. This allegation is material, and if there was no evidence tending to prove it, the instruction is not erroneous. 8 Blackf. 256. It may, however, be assumed that the rules which



govern the production of evidence do not, in cases like the present, require strict proof. If the averment be substantially proved, it will be sufficient.

The evidence shows that the defendant executed a note to *Gibson* for 200 dollars, being for a part of the purchase-money of real estate; that it was given up to the defendant, and in lieu of it he executed two notes, one to *Cole* for 110 dollars, and the other, the note in suit, to *Gibson*, for 90 dollars. What, then, was the consideration of the latter note? It was not in the giving up of the original note; because in that transaction the promisor received no benefit, nor did the promisee sustain injury. But the new notes were given for the same demand included in the old note; and the result seems to be, that the note sued on was really given, as alleged, in part payment for real estate. This conclusion being correct, and we think it is, the instruction cannot be sustained.

It is true, where a note has been assigned, and the assignee, in lieu of it, obtains from the maker a note payable to himself, it is not competent for the maker, in an action upon the new note, to set up in his defense a failure in the consideration of the original note; because, in the transaction, the assignee relinquished his right to sue on the assignment, and such relinquishment is a sufficient consideration for the new promise. This is the ruling in *Justice v. Charles*, 7 Blackf. 122, to which we are referred. See, also, *Williams v. Rank*, 1 Ind. R. 230.

But these cases, it will at once be seen, are not in point. The note before us is not subject to any consideration save that upon which the original note was founded. *Hill v. Buckminster*, 5 Pick. 391.—*The Commonwealth Ins. Co. v. Whitney*, 1 Met. 21.—*Kirkpatrick v. Muirhead*, 16 Penn. State R. 117.—*Huntington v. Colman*, 1 Blackf. 348.—*Aldridge v. Dunn*, 7 *id.* 249. These authorities fully sustain the positions assumed in this opinion.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*O. S. Hamilton* and *D. H. Hamilton*, for the appellant.

*A. J. Boone* and *H. Shannon*, for the appellees.

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SLAUTER *v.* WHITELOCK.

SLAUTER  
*v.*

WHITELOCK. If a mistake in not having a witness sworn, is discovered before the jury retire, it may be corrected by swearing the witness and rehearing his testimony; or the jury may be instructed to disregard his statements.

If no motion be made upon the discovery of the mistake, the parties will be deemed to have acquiesced in the reception of the unsworn statements as evidence.

And where such mistake was assigned as one of the written reasons for a new trial, but the record did not show, by affidavit or otherwise, when the mistake was discovered, if discovered at all before judgment, or whether any motion was made to correct it, the ruling of the Court refusing a new trial was sustained.

Wednesday,  
June 1.

APPEAL from the *Warren* Court of Common Pleas.

HANNA, J.—This was a suit for work and labor.

Answer—1. A general denial; 2. That defendant worked forty-three days on a special contract to work three months, which contract he abandoned, &c., whereby defendant suffered damage 30 dollars, &c.; 3. Set-off.

Trial by jury; verdict and judgment for plaintiff for 10 dollars, 70 cents.

The evidence shows that the plaintiff undertook to work for three months at 18 dollars per month; that he performed about forty-five days' work, when he was compelled to cease work, for a short time, because of an accident by which he was injured; that he was to receive his pay as he needed it; that a few days after he was injured, he asked for a settlement with defendant, and demanded his pay. There was evidence that defendant refused to pay plaintiff unless he would complete his contract, and offered to take the work after he recovered. Plaintiff gave notice he would not work any more, and brought suit.

The witnesses for the defendant state that he did not refuse to pay until after the plaintiff had stated that he would not work another day, and that he had, at times, offered to pay the plaintiff more than he took.

Contradicting this, is the statement of *Eli Angher*, who was introduced, and, in the language of the bill of exceptions, "by mistake, was not sworn, but stated and gave in



his evidence without being sworn." He detailed the terms of the contract at 19 dollars per month; that he went with plaintiff to ask a settlement, &c.—in other matters agreeing with the other witnesses, except in the statement, "that *Whitelock* had told him, before they went to *Slauter's*, that he would not work another day for *Slauter*; that *Slauter* would not pay him as he needed it."

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There is no evidence, other than the above, from which the jury could infer that the defendant refused to pay the plaintiff, when requested, until after the plaintiff announced he would not complete the contract.

The evidence of the defendant, if legitimate, shows that he was damaged, by the failure of the plaintiff, in a sum greater than the amount that would have remained due the plaintiff after deducting payments. The plaintiff offered no evidence upon that point. That evidence of defendant consisted of general statements of witnesses, based upon the farming operations of the defendant, the lateness of the season, &c., as to the amount of such damages, without specifying in what they consisted, except upon one point, and that was, that defendant had sold and was to deliver his old corn (eleven hundred bushels) at 70 cents per bushel, but by the failure of the plaintiff, was prevented from doing so until fall, when corn had declined to 50 cents. If this was the proper mode of measuring the damage, it will be seen it would amount to much more than the whole contract price of the labor for the three months. The evidence was not objected to.

In *Peters v. Whitney*, 23 Barb. 24, which was an action for breach of a contract for work to be done on a farm, evidence of damage to the plaintiff's crop was deemed inadmissible, because of the defendant's leaving, &c.; and it was held, in that case, that the legal measure of damages in such a case is the difference between the contract price and the price the plaintiff was obliged to pay to supply his place.

To the same effect are the decisions of this Court upon the question of the measure of damages. *Ricks v. Yates*,



May Term, 1859. 5 Ind. R. 117.—*Jones v. Van Patten*, 3 *id.* 107.—*Coe v. Smith*, 4 *id.* 79.

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In the case at bar, there was no evidence as to the wages of labor at the time of the breach. There was evidence that hired help was scarce; and one witness testified, incidentally, that the defendant could not procure a laborer to supply the place of the plaintiff; but there was nothing upon the point of the amount of wages that was offered.

It is insisted that upon the whole facts, the verdict should have been for the defendant.

Keeping out of view the statements of *Eli Angher*, there was ample evidence of the contract, its terms, and the amount of labor performed.

The payments proved left about the amount found by the jury.

It is manifest, then, that nothing was allowed for damages for a breach of the contract by the plaintiff.

If the evidence of *Angher* was legally before the jury, it was, then, a proper question for them to determine which party broke the contract. Without that there was no evidence for them to weigh and reconcile upon that point.

The statute (2 R. S. p. 80) requires witnesses to be sworn, which is but in accordance with the doctrines of the elementary writers. 1 Greenl. Ev. § 328. But in the case at bar, we are not informed when the mistake, as to the testimony having been given without the sanction of an oath, was discovered by the complaining party. The first we hear of it is in the reasons for a new trial. If it was known before the jury retired, the mistake could have been corrected by swearing the witness and rehearing the evidence; or if that course was not taken, by an instruction to the jury to disregard his statements. If no motion was made upon the discovery, by either party, it would amount to an acquiescence in the reception of his statements as evidence in the case.

As there is nothing shown, by affidavit or otherwise, in the record, we are bound to presume in favor of the ruling



of the Court, on the motion for a new trial, that such a state of facts existed as authorized that ruling, upon the point under consideration.

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Under these circumstances, there was testimony before the jury tending to show a breach of the contract by the defendant, and therefore to sustain the finding of the jury.

*Per Curiam*.—The judgment is affirmed with costs.

*B. F. Gregory* and *J. Harper*, for the appellant.

*J. R. M. Bryant*, for the appellee.



BARNES v. POWERS.

APPEAL from the *Tippicanoe* Court of Common Pleas. *Wednesday, June 1.*

*Per Curiam*.—*Powers*, who had, by proceedings under the statute, adopted an infant, *Francis W. Johnson*, as his son, filed a petition to remove *Barnes*, who had, before that time, been appointed guardian of said infant.

The reasons alleged were, that *Barnes* had failed to discharge his duty as such guardian, in this, that he had not, within three months after his appointment, made an inventory and report of the amount of the estate of his ward; nor had he loaned the same at interest, as was his duty; nor did he, in his report, account for interest upon said estate. The amount of the estate is shown. The guardian was appointed *October 30, 1854*. The inventory, &c., was filed *January 12, 1856*. The letters of guardianship were revoked.

By the statute, 2 R. S. p. 324, § 9, it is made the duty of the Court to remove a guardian who fails to file the inventory therein provided for, within three months.

In the case at bar, neither the removal, nor the application therefor, was made until after the report was made and approved by the Court.

If the time had then past—upon which it is not necessary



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 WATT.

for us to decide—within which it was the duty of the Court to make the removal, still the failure of the guardian in his duty, in that respect, was a circumstance to be taken into consideration, in connection with the use of the estate without accounting for interest, upon the question of removal.

The judgment is affirmed with costs.

*J. M. La Rue*, for the appellant.

*R. C. Gregory*, for the appellee.

DOYLE v. WATT.

Wednesday,  
 June 1.

APPEAL from the *Grant* Court of Common Pleas.

*Per Curiam*.—Suit upon a note by the payee against the maker. The note was filed with the complaint, and thus became a part of it.

The defendant answered that the note had been transferred by delivery, before the commencement of the suit, to one *Cooper*, whose christian name was to him unknown. He appended interrogatories to the plaintiff, calling upon him to state if such were not the fact, and added an affidavit for a continuance, on the ground that he could not prove the alleged transfer of the note by any one else, and that he expected "to elicit facts by the answer to the above interrogatories material to him on the trial," touching the fact of such transfer. He swore that he had been informed and believed the fact alleged in the answer to be true.

The Court sustained a demurrer to the answer, refused the continuance asked, and, the defendant refusing to answer further, heard the cause and gave judgment for the plaintiff for the amount of the note, &c.

It seems to us that the answer was too uncertain, and might have been set aside on motion. This being so, we shall not disturb the judgment of the Court below.



No motion, on written causes filed, was made for a new trial. May Term,  
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The judgment is affirmed with 10 per cent. damages and costs.

FREAR  
v.  
BRYAN.

*A. W. Sandford, J. H. Jones, A. Steele, and H. D. Thompson*, for the appellant.

*J. W. Sansberry*, for the appellee.

### FREAR and Another v. BRYAN and Others.

Suit by the assignees on a promissory note. Answer, 1. A set-off against the maker, before notice of assignment. 2. Payment to him before such notice. Afterwards, a third paragraph was filed, to the effect that, at the time the defendants delivered the goods and paid the notes, as in the two former paragraphs set forth, the maker was the owner of the note, and promised to deliver it to the defendants, but failed to do so, and fraudulently assigned it to the plaintiffs, without their knowledge, and without consideration; but that the legal interest in the note was, at the time of such delivery, &c., in the defendants, and that the plaintiffs never had legal title thereto. Prayer, that the maker be made a party.

*Held*, 1. That the third paragraph was bad either as an answer, or as a petition for a new party, if one could be presented.

2. That it was but a repetition of an answer already in, and, therefore, issue upon it was not necessary.
3. That as no reason appeared for making the proposed new party, he was a competent witness.

A party should not be joined as a co-plaintiff who has not, as the pleadings stand, any unity of interest with those already plaintiffs; nor should such a new party be made merely for the purpose of settling matters between him and the defendant, in which the original plaintiffs have no interest.

APPEAL from the *Tippecanoe* Court of Common Pleas. Wednesday,  
June 1.

HANNA, J.—This was an action by *Frear and Arbuckle*, on a note executed by *Bryan and Bryan* to one *Timmons*, and by him assigned to the plaintiffs.

The answer was—

1. A set-off held against *Timmons* before notice of the assignment.

2. Payment to *Timmons* before notice, &c.



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After several terms, they filed what they called a third paragraph, to the effect that, at the time the defendants delivered the goods and paid the note, as in the two former paragraphs set forth, said *Timmons* was the owner of the said note, and promised to deliver it to defendants, but failed so to do, and fraudulently assigned it to plaintiffs without their knowledge, and without consideration; but that the legal interest in said note, at the time of the delivery of said goods, vested in the defendants, and that said plaintiff had not, at any time, the legal title to said note.

Prayer, that said *Timmons* be made a party.

There was a denial to the first and second paragraphs of the answer. A demurrer to the third paragraph was overruled, and the ruling excepted to. Upon motion of defendants, the Court ordered *Timmons* to be made a party-plaintiff, and that he reply to said third paragraph. This he failed to do. The record does not show that he had notice of the order of the Court making him a party. No reply was filed by *Frear* and *Arbuckle*, to this third paragraph.

There was a jury trial; verdict and judgment for defendants. •

Upon the trial, the plaintiffs offered *Timmons* as a witness to prove, among other things, that he had assigned and delivered the note sued on to the plaintiffs, in part payment of a prior debt, and that he notified the defendants thereof, before he created the debt to defendants for goods, as set up in the pleadings and mentioned in evidence, &c.

Objection was made by the defendants, and he was not permitted to testify, &c.

It is said by the appellants, that two errors were committed by the Court.

1. In ordering *Timmons* to be made a co-plaintiff.
2. In excluding his testimony.

As to the third paragraph, the appellant assumes that it is a petition to the Court to make a new party, and not an answer. Without stopping to inquire whether the third paragraph was strictly an answer or not, it is manifest to



us that the demurrer should have been sustained to it, for the reason that it does not contain matter sufficient to make it either a good answer or a petition, if such could be presented, for the purpose prayed. *Conklin v. Bowman*, 11 Ind. R. 255. It could be considered, at most, but a repetition of an answer already in; and the failure to take issue upon it, therefore, worked no injury, as an issue was already formed under which the same evidence could be given as might have been offered under a denial of that paragraph.

As there was no sufficient reason shown for an order making *Timmons* a party to the record, he stood, as any other assignee of a promissory note, a competent witness, and the refusal to permit him to be introduced as such, was, therefore, error.

Upon the trial, if the proof had under the proper issues, disclosed that the plaintiffs were not the real parties in interest, they would have failed to maintain their suit (*Garrison v. Clark*, 11 Ind. R. 369); and we do not think that, in this case, an order ought to have been made directing a party to be joined as co-plaintiff, who had not, as far as the pleadings disclosed, any unity of interest with those who were already plaintiffs. Whether a case might arise where such an order ought to be made as to one not having a unity of interest, we do not decide. 2 R. S. pp. 30, 31. And surely a new party should not be made merely for the purpose of settling matters between that new party and the defendant, in which the original plaintiffs had no interest. 11 Ind. R. 255.—2 R. S. p. 41, § 63.

If the defendants had either paid the note or held a just offset against it, before notice of its assignment, he could, under the statute, as well avail himself of those defenses against the note in the hands of the assignee, as in the hands of the assignor.

The only plausible reason we can see for offering to make the assignor a party, was to place him in a position that, possibly, he might not be a competent witness.

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v.  
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May Term, 1859. *Per Curiam*.—The judgment is reversed with costs.  
Cause remanded, &c.

NORDYKE *H. W. Chase and J. A. Wilstach, for the appellants.*  
v. *W. C. Wilson and G. Gardner, for the appellees.*  
SHEARON.

### HURLBUT v. HURLBUT.

Wednesday,  
June 1.

APPEAL from the *Kosciusko* Circuit Court.

*Per Curiam*.—There is no error in the record of this cause.

It may be observed that where there is service, upon a resident attorney of a non-resident appellee, of notice of the appeal, no further notice is, in general, necessary.

The judgment is affirmed with costs.

*J. B. Niles, for the appellant.*

*H. O'Neal and O. H. Smith, for the appellee.*

### NORDYKE and Others v. SHEARON and Another.

In general a party may offer his evidence in the order he pleases; but where a previous fact is necessary to be proved, to render the evidence at all relevant, the Court may require proof of such fact as a condition of the admission of the evidence.

Wednesday,  
June 1.

APPEAL from the *Wayne* Court of Common Pleas.

PERKINS, J.—Suit for rent due upon a lease. The suit is by assignees. The defendants answered, setting up a set-off consisting of an account for repairs done upon the property leased.

On the trial the defendants proved the repairs. But this was not enough. It was necessary, as the case stood, to

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further prove that they were authorized by the plaintiffs. To do this, the defendants proposed to prove that they were authorized by one *Dugdale*, and then to prove that *Dugdale* was the agent of the plaintiffs. The Court required them to first prove that *Dugdale* was the agent, and then to prove that he authorized the repairs. This the defendants declined to do, and the evidence was not heard.

We think in this the Court abused no discretion. If *Dugdale* was not the agent, it was a waste of the time of the Court to hear evidence as to his ordering repairs. And it was no hardship to require the plaintiffs to first prove their right to order them. Without such proof, the evidence as to his ordering them had no relevancy to the case. It is true the Court might, if it had seen proper, have heard the evidence as proposed to be given; but we do not think it was bound to do so. In general, a party may offer items of evidence relative to the case in the order he pleases. Ind. Dig. 441. But where a previous fact is necessary to be proved, to render evidence at all relevant, we think it is proper that the Court should require proof of such fact as a condition of the admission of the evidence. Otherwise, the time of the Court might be trifled with. See 1 Greenl. Ev., p. 583, § 431.

The case is just this. A party says: "I have the evidence here to prove a fact, and also to prove its relevancy to the case." The Court answers: "Prove the relevancy, and then prove the fact. It will take no longer, will impose no hardship, and is the natural order of doing the business. And if it turns out that you cannot prove the relevancy, time is saved."

The party replies: "Unless I can do the business in my own way, and that an awkward, unnatural, and irregular one, I will not do it at all."

Such a party should go out of Court with a judgment against him.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

O. P. Morton and J. F. Kibbey, for the appellants.

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NORDYKE  
V.  
SHEARON.



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1859.

ANDREWS v. ANDREWS and Others.

ANDREWS  
v.

ANDREWS.

Evidence may be heard to show that there was no consideration for a deed. A deed drawn by mistake for a different interest from that intended to be conveyed, may be corrected if the mistake be clearly proved. A deed of gift is no exception to the rule. If a party, by such mistake, hold a greater estate than belongs to him, and convey it to an innocent purchaser, receiving the consideration, he may be treated as a trustee for the real owner.

Wednesday,  
June 1.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—Complaint upon the following facts:

*William B. Andrews*, in 1853, was about leaving *Lafayette, Indiana*, for *Australia*. He had an aged mother, *Sarah Andrews*, for whom he wished to provide. He conveyed to her a piece of property in *Lafayette*, on which she might reside, for the consideration, as expressed in the deed, of 400 dollars. After his departure, she sold the property for 1,000 dollars, and, with the proceeds, purchased two lots in *Lafayette*. Soon after, she died, leaving several heirs.

*William B. Andrews*, the grantor of the house to *Sarah*, now prosecutes this suit for the purpose of having the title to the two lots purchased by *Sarah*, vested in him.

As the ground of his prayer for such judgment, he alleges, in addition to the facts already stated, that he received from said *Sarah* no consideration for his conveyance to her; that the conveyance was a gift, and designed to be; but that, by mistake and contrary to his intention, the deed was drawn for the fee simple, instead of for a life estate, which was all that was to have been conveyed.

The Court below dismissed his complaint, on demurrer.

It is claimed that evidence could not be heard to show that there was no consideration for the deed. This is a mistake. *Rockhill v. Spraggs*, 9 Ind. R. 30.

It is a general proposition of law, that a deed drawn by mistake, for a different interest than that intended to be conveyed, may be corrected, if the mistake be clearly



proved. *Linn v. Barkey*, 7 Ind. R. 69. We do not see why a deed of gift should form an exception. May Term,  
1859.

And if the fact can be established that *Sarah Andrews*, by mistake, held the title to a greater interest than belonged to her, and conveyed it to an innocent purchaser, receiving the consideration, it would seem that she might be treated as a trustee for the real owner. *Beckett v. Bledsoe*, 4 Ind. R. 256. THE PRESIDENT, &c.  
v.  
BRINKMEYER.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded with instructions to require the defendant to answer.

*E. H. Brackett* and *J. O'Brian*, for the appellant.

*J. L. Miller*, for the appellees.

### THE PRESIDENT AND TRUSTEES OF LAMASCO CITY, HOOVER and Another v. BRINKMEYER.

A judgment cannot be reversed, under the code, for error in ruling upon a demurrer for misjoinder of causes of action.

Action to enjoin the extension of a street through the plaintiff's land. The complaint set up title. Answer, that the plaintiff had no title or interest in the land, rejected, on motion, as tendering an immaterial issue. A general traverse was also pleaded. *Held*, that the matter of the rejected paragraph was material; but that as it might have been proved under the general traverse, there was no error in rejecting it.

The Court of Common Pleas cannot, under the statute, try an issue involving the title to real estate, arising upon an application for an injunction.

APPEAL from the *Vanderburgh* Court of Common Pleas. Wednesday,  
June 1.

DAVISON, J.—*Brinkmeyer* filed a complaint in the Court of Common Pleas, to enjoin the appellants, who were the defendants, from opening or extending the streets of *Lamasco City* upon, through, or over his land; also to enjoin the collection of a tax assessed for corporation purposes.

The facts alleged in the complaint are substantially these: The plaintiff is the owner, in fee simple, of a tract



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MEYER.

of land in *Vanderburgh* county, containing twenty acres, which is bounded on the south, in part on the east, and in part on the west, by property within the corporate limits of *Lamasco City*. Said tract is not, nor has it ever been, platted or laid off into town lots; but the same is, and has been, used exclusively for manufacturing brick, and for agricultural purposes. *Franklin* street and *Sixth* street would, if extended east, pass through plaintiff's land, which land is bounded on the south by *Ann* street, and which street, so far as it forms such boundary, is only thirty feet wide.

Defendants pretend that, by certain proceedings of the board of commissioners of said county, had at their *March* term, 1855, a portion of said land, and particularly the southern end of it, was incorporated into, and became, a part of *Lamasco City*; and that, in virtue of such pretense, they are actually engaged in digging down and opening *Ann* street, to the width of forty feet, along the south end of plaintiff's land, immediately in front of his dwelling-house, pretending that they, the defendants, have a right to widen the street.

It is averred that the proceedings before the commissioners are void in law; that defendants threaten to extend *Franklin* and *Sixth* streets through said land, and are engaged in taking and appropriating a strip of it about ten feet wide, for the use of the town, without first making or tendering to the plaintiff any compensation therefor. And that they have caused ten acres of the same land to be assessed for taxation, as though it really was within the corporate limits of the town.

Damages to the amount of 100 dollars are claimed for the trespass, &c., and an injunction prayed, &c.

Defendants demurred to the complaint; but their demurrer was overruled, and they excepted. It is insisted that the demurrer should have been sustained; that this was not merely a complaint for an injunction, but also an action of trespass, seeking reparation in damages, and that, therefore, several causes of action were improperly united. The code says, "No judgment shall ever be re-



versed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." 2 R. S. p. 38, § 52. It follows that the objection raised to the complaint is not available in this Court.

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THE PRESIDENT, &c.

v.  
BRINKMEYER.

The defendants answered in five paragraphs. The first was rejected on motion. Demurrers were sustained to the second and third. The fourth was a general denial; and to the fifth there was a reply. The jury found a special verdict for the plaintiff, upon which the Court, having refused a new trial, rendered judgment that the defendants be enjoined, &c.

The first paragraph avers, that "the plaintiff had no title to, or interest in, the land referred to in the complaint." This, it appears, was rejected on two grounds—

1. The matter stated was irrelevant, and tendered an immaterial issue.

2. It was surplusage, being, if material, contained in the general denial.

The first ground is not well taken. If the plaintiff had no title to, or interest in, the land which he describes, he was evidently not entitled to an injunction; hence, the matter pleaded was material. But the complaint itself alleges title in the plaintiff, and that allegation being material, it was competent for the defendants, the plaintiff having made a *prima facie* case, to disprove it under the general traverse. Van Santv. Pl. 453.—*Benedict v. Seymour*, 6 How. Pr. 298. And the result is, there being, in this instance, a defense well pleaded, under which the defendants could have proved the matter stated in the rejected paragraph, its rejection cannot be assigned for error. 4 Ind. R. 79.—7 *id.* 178.

In connection with this, the inquiry arises—Had the Common Pleas jurisdiction? The statute says that that Court shall have no jurisdiction where the title to real estate shall be in issue. 2 R. S. p. 18, § 11. And further, it declares that where such title shall be in issue, the Circuit Court shall have original, exclusive jurisdiction. *Id.* p. 6, § 5. Either provision is broad enough to extend to any case where the title to real estate may be in issue,



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and the latter points out, very distinctly, the Court in which that issue is triable. To this statutory rule, we know of but one exception, and that occurs in cases for partition. Section 5 of the act establishing Courts of Common Pleas, expressly confers upon that Court and the Circuit Court, in such cases, concurrent jurisdiction. *Id.* p. 17. And we have decided that the jurisdiction thus conferred on the former Court necessarily includes the power to settle the title to real estate, in order that it may be able to effect the partition. 7 Ind. R. 74.—8 *id.* 147. But this decision does not, in our opinion, apply to the case at bar; because the statute under which it proceeds, though it authorizes each Court to grant injunctions, does not confer upon them concurrent jurisdiction. 2 R. S. p. 59, § 136. This statute, it seems to us, confers no power on the Common Pleas to try any issue the trial of which in that Court is inhibited by the act creating it. *Id.* p. 18, § 11. Here, by an averment in the complaint, which is directly traversed by the answer, the title to real estate is directly in issue, and, in sequence, the Common Pleas had no jurisdiction.

Other points are made in the argument; but the Court, having no power to try the case, they do not properly arise in the record.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. Law* and *H. Plumer*, for the appellants.

*C. Baker*, for the appellee.

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#### DRAPER and Others v. VANHORN and Others.

In a suit upon an attachment-bond, the plaintiff, to prove that the attachment was wrongfully obtained, offered in evidence the record of the suit in which it had been obtained, and in which judgment had been rendered against the party obtaining it; but the Court rejected the record because it had not been filed with the complaint. *Held*, that this was error.



In a suit upon an attachment-bond, a contract incidentally involved as an extrinsic fact proper to be proved in the trial of an issue, may be proved by parol, if shown to be destroyed. May Term,  
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The rejection of a witness merely because he is a co-plaintiff, is error.

Under the code, the Court may render judgment for one of several joint plaintiffs, and against the others; or a larger sum for one, and a less one for the others; and so of defendants. The Court possesses chancery powers in adapting its judgments to the rights of the parties.

One of several co-plaintiffs is a proper witness to prove special damages to separate property of another co-plaintiff—the increase of the judgment that might be rendered on account of such damages, being necessarily in favor of the latter, alone.

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v.  
VANHORN.

APPEAL from the *Grant* Circuit Court.

Wednesday,  
June 1.

PERKINS, J.—Suit upon an attachment-bond, reading thus:

“We, *Joseph G. Vanhorn*, *James Rhine*, and *William H. Campbell*, acknowledge ourselves to owe and be indebted to *John Draper* and *William Matson* in the sum of 460 dollars, for the payment of which, we bind ourselves, our heirs, &c. Sealed with our seals, &c.

“The condition of this bond is this, that whereas the above bound *Joseph G. Vanhorn* has this day obtained a writ of attachment against the goods and chattels of said *John Draper* and *William Matson*; now if the said *Vanhorn* shall well and truly prosecute his suit to effect, and pay all damages which may be sustained by the defendants, if the proceedings of the plaintiff are wrongful and oppressive, then,” &c. [Signed].

The writ of attachment mentioned in the bond, was laid upon one hundred and thirty-two bushels of mustard seed, the separate property of said *John Draper*, one of the attachment-defendants.

It is averred for breach of the bond, that the attachment was wrongful and oppressive, in this, that the defendants did not owe the attachment-plaintiff anything; that the plaintiff failed in the attachment suit, for that reason, and had judgment against him for costs; and it is further averred that *Draper* sustained a large amount of damages special to himself, by reason of being disabled to fulfill a contract he had previously made for the sale and delivery of the mustard seed, the fall of price, &c.



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Answer, the general denial.

Trial by the Court, judgment for the defendants.

The plaintiffs asked leave to make certain amendments before and upon the trial, which the Court refused, and erroneously. Ind. Dig. 111, 279, 677.—*Billingsley v. Dean*, 11 Ind. R. 331.

The attachment was obtained to secure property, as an incidental proceeding to a pending suit, and not as the commencement of the suit for the recovery of the debt. See *Abbott v. Zeigler*, 9 Ind. R. 511.

In this suit upon the attachment-bond, the plaintiff, as tending to prove the breach assigned, that the attachment was wrongfully obtained, offered in evidence the record of the suit in which it had been obtained, and in which judgment had been rendered against the party obtaining it, but the Court refused to permit the record to go in evidence, because it had not been filed with the complaint. This was error. This suit was upon a bond. That was its foundation, and that was filed. But a party is not required to file the evidence by which he expects to prove the allegations in his pleadings.

After the mustard seed above mentioned had been attached, and *Draper*, in consequence, had been prevented from delivering it, in fulfillment of his written agreement with one *Manspollon*, he had compromised the matter with him, and the contract, which was in the custody of a third person, had been destroyed by him, in pursuance of the agreement of compromise.

On the trial of this cause, *Draper*, as tending to prove the damages he had sustained by the attachment, proposed to prove this contract, and the loss he had sustained by its non-fulfillment. He offered parol evidence of the contract, having shown its destruction, under the circumstances above described. The Court refused to permit the proof. This was error.

This suit was not upon that contract. It had been destroyed in the legitimate course of business between the parties to it. It was involved in this suit only incidentally, and was important only as one of the extrinsic facts pro-



per to be proved in the trial of an issue in it. Under such circumstances, the contract not being in existence, its terms might be proved by parol. See *Noble v. Epperly*, 6 Ind. R. 468.

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On the trial, *Draper* offered his co-plaintiff as a witness touching the detention of the mustard seed, and the consequent damages. The Court refused to hear him testify, because he was a co-plaintiff. This was error.

Under our present code, the Court may render judgment for one of several joint plaintiffs and against the others; or a larger sum for one, and a less one for the others; and so of defendants. The Court possesses chancery powers in adapting its judgments to the rights of the parties. 2 R. S. p. 121, § 386.—*Douglass v. Howland*, 11 Ind. R. 554.

In regard to the item of special damage in this case, *Draper* alone had an interest, as the property attached was his separate property. Hence, as to that, his co-plaintiff was a competent witness—the increase in the judgment that might be recovered on account of such damage, necessarily being rendered in favor of *Draper* alone. 2 R. S. p. 97, § 302. See *Douglass v. Howland*, *supra*.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded with instructions to proceed in a new trial in accordance with this opinion.

*J. Brownlee* and *H. S. Kelly*, for the appellants.

*H. D. Thompson* and *I. Van Devanter*, for the appellees.

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BATES v. KUHNS.

Where the demand proved by the plaintiff is reduced below 50 dollars by any defense other than payment, the defendant is liable to judgment for costs.

APPEAL from the *Fayette* Court of Common Pleas. *Wednesday,*  
*DAVISON, J.*—*Kuhn* brought this action against *Bates*, *June 1.*



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v.  
KUHN.

upon an account for work and labor, in cutting cord-wood.  
Amount demanded, 373 dollars, 50 cents.

Defendant's answer contains four paragraphs—

1. A general traverse.

2. Setting up a special contract, under which the work and labor charged in the complaint is alleged to have been done, which contract, it is averred, the plaintiff failed to perform, and for the breach thereof, damages are claimed, &c.

3. Set-off,

4. Payment.

Issues were properly made and submitted to a jury. Verdict in favor of the plaintiff for 37 dollars, 75 cents, upon which the Court, having refused a new trial, rendered judgment, &c.

The evidence is upon the record. The plaintiff proved that he cut and corded three hundred and ninety-eight cords of wood for the defendant, the cutting and cording of which was worth 75 cents per cord; also seventy-five cords, worth one dollar per cord—the whole worth 373 dollars, 50 cents. Here the plaintiff rested. The defendant introduced evidence tending to prove that the cords put up by the plaintiff were not full cords. Upon this point, however, the evidence was conflicting. It was proved that defendant paid the plaintiff, on account of such cutting and cording, 323 dollars, 25 cents; and that he, defendant, received the wood, as cut and corded by the plaintiff. There is no evidence amounting to proof of the special contract set up in the second paragraph.

At the proper time, the defendant moved the Court to adjudge costs against the plaintiff, on the ground that his judgment was reduced below 50 dollars, by payments. The motion was overruled, and the defendant excepted.

The code provides that, "In actions for money demands on contract, commenced in the Circuit Court, or Court of Common Pleas, if the plaintiff recover less than 50 dollars, exclusive of costs, he shall pay costs, unless the judgment has been reduced below 50 dollars by set-off or counter-claim pleaded and proved by the defendant, in which case



the party recovering judgment shall recover costs. When the judgment is reduced below 50 dollars, by proof of payments, the defendant shall recover costs." 2 R. S. p. 126, § 397.

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v.  
MATLOCK.

As we have seen, the demand proved was 373 dollars, 50 cents, of which there was paid 323 dollars, 25 cents, leaving a balance in favor of the plaintiff of 50 dollars, 25 cents—an amount within the jurisdiction of the Common Pleas. It is, therefore, evident that the plaintiffs judgment was not reduced below 50 dollars, by payments; and, it seems to us, that under a proper construction of the statute, the conclusion must be, that where the demand proved by the plaintiff is reduced below that sum by any legitimate defense other than that of payment, the defendant is liable to a judgment for costs.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*B. F. Claypool and E. Vance*, for the appellant.

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BURGESS v. MATLOCK.

APPEAL from the *Hendricks* Circuit Court.

Wednesday,  
June 1.

*Per Curiam.*—Suit to foreclose a mortgage.

The defendant answered in two paragraphs. Demurrer to one paragraph sustained, and rule to answer over. Issue upon the other paragraph. The defendant refused to answer over on the demurrer. The Court heard the cause, and rendered final judgment for the plaintiff.

Two objections are taken—

1. That the judgment is for too much. According to our calculation, it is not.

2. That a jury was not called to try the cause. There was an issue upon one paragraph of the answer, which went to the whole complaint. But the defendant was present at the trial by the Court—made no objection—



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moved for a new trial, and did not assign the trial by the Court, instead of a jury, as a cause—took no exception to the mode of trial.

It is too late to raise the objection here.

The judgment is affirmed with 8 per cent. damages and costs.

*H. C. Newcomb, J. S. Tarkington, and S. M. Campbell,*  
for the appellant.

*C. C. Nave and J. Witherow,* for the appellee.

MARSH and Another v. SHERMAN.

Thursday,  
June 2.

APPEAL from the *Marshall* Circuit Court.

*Per Curiam.*—Complaint by the appellee against the appellants, to set aside a sheriff's sale and conveyance of real estate. Trial by the Court; finding and judgment for plaintiff below.

The facts, so far as is necessary to state them in order to an understanding of the point on which the case turns, are as follows: In *January, 1854, Marsh and Stephenson* took a judgment by confession against *Pomeroy and Brother*, in the *Marshall* Court of Common Pleas, for the sum of 1,072 dollars, 4 cents, on which *Levi C. Barbour* became replevin bail. After *Barbour* became replevin bail, he sold and conveyed to the plaintiff the property in controversy, and it was afterwards levied upon and sold to satisfy an execution issued upon the judgment, and purchased by *Marsh*, one of the judgment plaintiffs.

Several objections are urged against the validity of the confessed judgment and sale under it; but we shall only notice one, as that is decisive, being the want of jurisdiction in the Common Pleas to render judgment in such case.

The Circuit Courts have exclusive, original jurisdiction in all cases of "one thousand dollars or upwards;" and in



the case of *Shaw v. Gallagher*, 8 Ind. R. 252, it was held that such exclusive jurisdiction in the Circuit Courts extended to confessed judgments as well as others.

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The Court of Common Pleas not having jurisdiction of the subject-matter in point of amount, the judgment was a nullity, and no title was acquired by the purchaser upon the sale under it. The execution was void on its face, showing that it was issued upon a judgment rendered by a Court having no jurisdiction to render such judgment, and was notice to all the world, and especially to the execution-plaintiffs, of its invalidity. *Vide Armstrong v. Jackson*, 1 Blackf. 210.

It follows that the judgment of the Court below is right, and must be affirmed.

The judgment is affirmed with costs.

*C. H. Reeve*, for the appellants.

*A. G. Deavitt*, for the appellee.

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WARE v. ADAMS.

A referee, acting under a reference to him of the matters in issue in a pending suit, has no right to report the evidence given before him, though he may report the facts proved by it, if authorized to do so by the parties.

The authorities upon this point are based upon the assumption that, under the statute there is but one way of bringing the facts before the Court, viz., by requiring the referee to report the facts found and the conclusions of law, separately; and then, upon exception, the Court will review the decision of the referee as it would its own proceedings on a motion for a new trial.

APPEAL from the *Johnson* Circuit Court.

Thursday,  
June 2.

DAVISON, J.—*Adams* brought this action against *Ware* upon a written agreement entered into by the parties, and dated August 4, 1854. By the agreement it is witnessed, that *Adams* had sold to *Ware* the undivided half of a steam saw-mill, then situate five miles from *Columbus, Indiana*, together with the undivided half of two log-wagons, three yoke of oxen, chains, and other property,



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known as the mill property. Further, *Adams* agreed to move the mill to *Ware's* land, and put it up so as to have it in operation by the 1st of *November* next ensuing, until which time he was to have possession of the mill and mill property. And *Ware*, in consideration of the aforesaid sale, agreed to pay *Adams*, on or before the 1st of *September* next after the date of the agreement, 200 dollars, and by the 5th of *December*, 1854, the further sum of 700 dollars. *Ware* also agreed to allow the mill to be put up on his land in *Johnson* county, and give four acres adjoining the mill for its use, as long as it should be owned by the parties. It was agreed that said parties should constitute a partnership, in which each partner was to bear half the expense, and share half the profits, the partnership to commence as soon as the mill was moved and put into running order, each party to bear one-half the expense of building houses for the use of workmen at the mill.

The complaint avers that plaintiff performed all the stipulations in said agreement on his part to be performed. But it is alleged that the defendant failed to pay the 900 dollars as therein stipulated, or any part thereof, and further, that he failed and refused to bear one-half of the expense of building a house for the use of the workmen at the mill—a house for such purpose having been built at a cost to the plaintiff of 300 dollars, over and above the amount advanced by the defendant for said building, &c. The complaint contains five other paragraphs; but a statement of them not being important in the investigation of the case, they will not be further noticed.

Issues were made, and the cause, by agreement, &c., was referred to *Guilderoy Hicks*, a master commissioner, for adjustment and ascertainment of the evidence.

At the *March* term, 1857, of said Court, the commissioner filed his report, with a statement of the evidence given before him. Under the issues, and upon the evidence, the commissioner found specially as follows:

“The plaintiff is entitled to the contract price for the half of the mill erected on defendant's land, and half of two log-wagons, three yoke of oxen, and other property



known as the mill [property] in said agreement mentioned.....	\$900 00	May Term, 1859.
Also, to the value of one yoke of oxen.....	30 00	WARE v. ADAMS.
Interest.....	50 00	
<hr/>		
Making in the whole.....	\$980 00	
That defendant has paid on said agreement.....	\$400 00	
And is entitled to a set-off in the sum of.....	140 50	
<hr/>		
	\$540 50	
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	\$439 50	

Which sum of 439 dollars, 50 cents, is found in favor of the plaintiff and against the defendant. [Signed]

*G. Hicks, Master, &c."*

This report having been filed, the defendant excepted to the finding of the master—1. Because the same is contrary to law; 2. Because it is contrary to the evidence.

Under these general causes, there are various specifications which point out definitely the ground upon which they allege the evidence to be insufficient to sustain the finding; but the Court overruled the exceptions, and gave judgment in favor of the plaintiff for the amount found by the master.

It may be noted that, in this instance, the master occupies the identical position of a referee under the practice act. 2 R. S. pp. 116, 117, §§ 349, 350, 351. And as we understand the duties of such referee, acting under a reference to him of the matters in issue in a pending suit, he has no right to report the evidence given before him, though he may report the facts proved, if authorized to do so by the parties. *The Indiana Central Railway Co. v. Bradley*, 7 Ind. R. 49.—*The Trustees, &c. v. Huston*, at the present term (1). These decisions proceed upon the principle that, under the statutory provisions to which we have referred, there is but one way of bringing the facts before the Court, viz., by one or both of the parties requiring the referee to report the facts found and the conclu-



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sions of law separately. Then, upon exceptions taken, the Court will review the decision of the referee, in like manner and under the same regulations, as it would its own proceedings on a motion for a new trial. Section 350, *supra*.

The result is, that the evidence reported by the master, in the case at bar, is not properly before us, and, consequently, not examinable in this Court. We have, however, looked into the evidence carefully, and are of opinion that it sustains the finding of the master.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*F. M. Finch*, for the appellant.

*S. P. Oyler, G. M. Overstreet, and A. B. Hunter*, for the appellee.

(1) *Ante*, 276.

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JOHNSON, Executor, v. COX.

Thursday,  
June 2.

APPEAL from the *Warren* Court of Common Pleas.

PERKINS, J.—*Cox* filed a claim against the estate of *Thomas Johnson*, deceased. It was not admitted, and was placed upon the issue docket. *James Johnson*, the executor of the last will of *Thomas*, appeared as defendant. He filed an offset, &c.

There was a trial. The Court granted a new trial upon an affidavit of surprise at the testimony of a witness, newly discovered evidence, &c.

The new trial was had. *Cox* obtained a verdict and judgment.

*Johnson* appeals. The evidence is upon the record. We cannot say it does not sustain the verdict and judgment.

It is urged that the Court erred in granting the new



trial. The Supreme Court will not reverse a judgment because a new trial was granted, except in a very plain case of error. Ind. Dig. p. 418.

The Court refused to permit the defendant to testify as a witness on his own motion. This was not error.

The Court suppressed three answers of *Deborah Johnson*, the widow of *Thomas*, deceased. See *Jack v. Russey*, 8 Ind. R. 180. Besides, it does not appear that the suppressed answers could have materially influenced the verdict.

The Court refused to permit one *Stufflebeam* to be impeached by contradiction. It does not appear that a foundation for such impeachment was laid. We see no error that should reverse the judgment.

The judgment is affirmed with 5 per cent. damages and costs.

*R. A. Chandler*, for the appellant.

*B. F. Gregory* and *J. Harper*, for the appellee.

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THE EVANS-  
VILLE, &C.,  
RAILROAD CO.  
v.  
POSEY.

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THE EVANSVILLE, INDIANAPOLIS AND CLEVELAND STRAIGHT  
LINE RAILROAD COMPANY v. POSEY.

APPEAL from the *Pike* Circuit Court.

Thursday,  
June 2.

*Per Curiam*.—Suit by the company on an absolute and unconditional subscription, by the defendant, to the capital stock of the company.

Judgment for the defendant.

The defense set up was, in substance, that the subscription was obtained by the fraud of the company, through her agents, in representing and promising the defendant that the road would be located through, or, at most, within a half a mile of the town of *Petersburgh*, whereas it has been located and constructed two miles from said town.

That such defense cannot prevail, has heretofore been



May Term, 1859. decided by this Court. *The New Albany and Salem Railroad Co. v. Fields*, 10 Ind. R. 187.

ROY v. HAVILAND. The judgment is reversed with costs. Cause remanded for a new trial.

*O. H. Smith*, for the appellants.

*L. Q. De Bruler*, for the appellee.

### ROY and Another v. HAVILAND.

Suit for the rescission of a contract for the conveyance of land, on account of fraud in obtaining the contract. The complaint alleged that one of the defendants was the plaintiff's agent for the care of the land and to procure a purchaser; that, in his correspondence as such agent, he fraudulently misrepresented the value of the land, and induced the plaintiff to sell it to the other defendant, who had notice of the fraud, for one-half its value—the defendants having a contract between themselves for the conveyance of one-half of the land to the agent, he furnishing half the purchase-money.

*Held*, 1. That the correspondence was admissible in evidence to prove the agency, and, perhaps, the fraud.

2. That the agent was a proper party to the suit.

3. That the agent, being a proper party, could not testify as a witness in relation to matter going to defeat the action against both defendants, though he might testify as to matters affecting the recovery, or the amount of it, against his co-defendant alone.

A party from whom a contract has been obtained by fraud, may have his action for its cancellation, though it be not signed by the defendant.

In a suit for the rescission of a contract for the conveyance of land, on account of fraud in obtaining the contract, the defendants answered that they had made valuable improvements, but did not describe them nor state their value. *Held*, that the matter was not well pleaded; and that if it had been, it is not clear that the defrauding party could avail himself of the defense to prevent a rescission.

Thursday,  
June 2.

APPEAL from the *Lagrange* Circuit Court.

PERKINS, J.—*Haviland* sued *Charles Roy* and *John A. Butler*, for the rescission of a contract for the conveyance of land, on account of fraud in obtaining the contract.

The complaint reads as follows:

"*Almond Haviland* complains of *John A. Butler* and



*Charles Roy*, and says that he was, on, &c., at, &c., the owner in fee simple of a certain tract of land, containing one hundred and sixty acres, in the county of *Lagrange, Indiana*, and particularly described as follows, to-wit: The north-east quarter of section thirty-six, in township thirty-seven, north of range nine east; that he had, for the last five years, resided at *Geneva*, in the state of *New York*, and had not seen said land, nor known of any change in its value, during that period; that for the last four years, said *Charles Roy* (who resided in *Indiana*, near the land) had acted as the agent of the plaintiff in the care of the land, preventing waste upon it, and in endeavoring to find a purchaser of it.

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v.  
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"The plaintiff further says that by the representations and agency of said *Roy*, he was, on the 6th of *March*, 1854, induced to execute a written contract for the sale of the land to said *John A. Butler*, for the sum of 1,000 dollars, payable, 200 dollars on the execution of the contract, and the remaining 800 dollars in four equal annual payments of 200 dollars each, with interest at 7 per cent., a copy of which contract is filed with and made a part of the complaint.

"The plaintiff further says that said *Roy*, as the agent of the plaintiff, on the delivery of said contract to *Butler*, in said county of *Lagrange*, received the first payment of 200 dollars, and sent the money to the plaintiff at *Geneva*, in the state of *New York*.

"The plaintiff further says that at the time of the execution of said contract, the land was worth 2,000 dollars, as said *Roy* and *Butler* well knew, but of which fact the plaintiff was not advised, as said *Roy* and *Butler* well knew.

"The plaintiff further says that the contract was obtained by said *Butler* by the fraud of said *Roy* and *Butler*; that said *Roy*, in all his correspondence with the plaintiff touching said land and the contract for its sale, concealed the fact that it had shortly before risen to double the value it possessed when the plaintiff last saw it, and took measures to prevent other persons from giving to the



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plaintiff information of the fact, and to induce them to falsely represent to him the contrary.

"The plaintiff further says that before, and at the time said contract was executed, it was, without the knowledge of said plaintiff, agreed between the said *Butler* and said *Roy* that said land should be divided between them—each taking one-half, and paying one-half of the purchase-money; and that, in pursuance of said agreement, said *Butler*, on the same day that the contract between him and the plaintiff was delivered, and before the 200 dollars was paid, executed to said *Roy* a written contract to convey to him the south half of said land purchased, for 500 dollars, to be executed when he should receive his deed from the plaintiff, and on the 500 dollars being paid as the payments came due to the plaintiff on the purchase from him.

"The plaintiff further says that 100 dollars of the 200 dollars paid as the first payment to the plaintiff, was paid by *Roy*, under his agreement with *Butler* to pay for and have half of said land.

"The plaintiff charges that said *Butler* had notice of all the above facts; that he knew said *Roy* was acting as the agent of the plaintiff, and that both were colluding to get the land from the plaintiff for half its value, and then to be divided between them.

"The plaintiff further avers, that as soon as he received information of the fraud, he tendered back to said *Butler* the 200 dollars paid, with interest, amounting to the sum of 11 dollars, and the written contract, and demanded a rescission of the contract, and that he brings said money and contract into Court.

"The plaintiff prays that said contract may be rescinded, and for all proper relief," &c.

The defendants answered.

They admit the residence of the parties, the contracts for the sale of the land, the payment of 200 dollars, and the agency of *Roy* as to the care of the land, as charged in the complaint. They allege ignorance as to *Haviland's* knowledge of its value.



They deny that *Roy* was the agent to find a purchaser of the land; deny all false representations and suppression of facts; deny that the land was worth 2,000 dollars; deny that the agreement that *Roy* should have half the land was made before or at the time of *Butler's* purchase from *Haviland*; but admit that he purchased half of it afterwards; and they allege that they have made valuable improvements on the land.

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The cause was tried by a jury, who found for the plaintiff; and there was judgment on the verdict. The Court adjudged that the contract be rescinded and delivered up, and the money paid into Court be delivered to the defendants.

On the trial, the Court permitted all the correspondence touching the subject-matter, between *Roy* and *Haviland*, to be given in evidence by *Haviland*. This was right. That might establish one link, at least, perhaps more, in the chain of evidence, to-wit, the agency of *Roy*, and possibly his fraud upon *Haviland* in the transaction. Other evidence might prove the participation of *Butler* in the fraud.

It should be observed that no particular objection to the admission of the correspondence was pointed out at the time it was given in evidence.

It is objected that *Roy* was not a proper party to the suit; but we think he was so. He was, according to the case made, in reality a joint purchaser of the land; and a judgment rescinding the contract of sale would necessarily deprive him of the power to obtain a conveyance of the half of it which was to be conveyed to him. It was peculiarly a case in which the rights of all parties should be settled in the same suit; and the evidence showed that he furnished one-half of the money to make the first payment, which, in the final judgment was awarded to be returned to him.

*Roy* was offered as a witness for his co-defendant, and was rejected. We have seen that he was a proper party to the record, and, hence, might be subjected to a joint



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judgment with his co-defendant, at least, as to costs. The matters which he was offered to testify in relation to, went to defeat the whole action against both defendants. Under such circumstances, we cannot say he was erroneously excluded. *Dearmond v. Dearmond*, 10 Ind. R. 191. See *Draper v. Vanhorn*, at this term (1). Had he been offered to testify as to matters affecting the recovery, or the amount of it, against his co-defendant alone, it would have been error to reject him.

It is said that the contract sought to be canceled and delivered up, was not signed by the defendant below, and that, hence, he could not be sued for its surrender. However much force this proposition might have, were this a suit to enforce this contract (and as to that we decide nothing), we have no doubt that a party from whom a contract, binding upon him, has been obtained by fraud, may have his action to procure its cancellation. The complaint in this case, contained facts constituting a cause of action; and upon the evidence we do not feel authorized to disturb the finding of the jury. See *Beckett v. Bledsoe*, 4 Ind. R. 256.

One other point is made. The paragraph in the answer which denies all the allegations of fraud in the complaint, also alleges that the defendants have "made valuable improvements on and near the land." The improvements are in no manner described, nor is any value of them stated. It is said this allegation set up new matter which was not replied to, and is, therefore, admitted; and that such improvements preclude a rescission of the contract. The part of the paragraph in denial of the complaint formed a good issue.

The allegation as to improvements is not made with sufficient certainty to constitute good pleading and render the paragraph double. And as no amount of improvements was alleged or proved, the question as to them can have no bearing upon the case. Besides, it is not clear that the defrauding party could avail himself of them to prevent a rescission. *Newell v. Gatling*, 9 Ind. R. 572.



*Per Curiam*.—The judgment is affirmed with costs.  
*R. Parrett and J. M. Flagg*, for the appellants.

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(1) *Ante*, 351.

### HAWK v. CRAGO.

APPEAL from the *Howard* Court of Common Pleas. *Thursday, June 2.*

*Per Curiam*.—*Hawk* commenced a suit before a justice, upon a written article of agreement between him and *Crago*, as to the rent of certain lands, and clearing of certain other lands, &c. *Crago* filed an offset. *Hawk* recovered judgment. *Crago* appealed to the Common Pleas Court, and there had a verdict and judgment.

But one point is made in the brief of counsel of appellant, and that is upon the instructions given to the jury.

No error in the instructions has been specially pointed out by counsel, nor was the exception any more satisfactory, as it was general as to all the instructions. *Garrigus v. Burnett*, 9 Ind. R. 528.

The judgment is affirmed with 5 per cent. damages and costs.

*H. Brouse and H. P. Biddle*, for the appellant.

*N. R. Lindsay and T. J. Harrison*, for the appellee.

### O'BRIAN v. THE STATE.

Where a statute confers a new power upon a justice of the peace, he must follow the statute strictly.

Where an offense is committed within the view of a justice of the peace, he can do no more, under the statute, than direct the arrest of the offender, and have him kept in custody for one hour, unless sooner taken from custody



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by a warrant issued on complaint under oath. He cannot try the prisoner until he is charged by such complaint; and if he try and convict him, the conviction is a nullity, and is no defense upon a trial for the same offense in the Common Pleas.

APPEAL from the *Tippecanoe* Court of Common Pleas.

DAVISON, J.—The information in this case charges that *O'Brian*, on, &c., at, &c., committed an assault and battery upon one *Luke Reilly*. Plea, not guilty. The Court tried the cause, and found for the state. New trial refused, and judgment.

The evidence shows that the offense charged was committed in the presence of *John Allen*, a justice of the peace, during the progress of a trial before him; that immediately upon the commission of it, the justice ordered the defendant to be arrested, there being a constable in the room, telling him that he was guilty of an assault and battery; that the defendant pleaded guilty to the charge, and submitted the case to the justice, saying that he would waive all process and papers, as he was desirous of saving costs. The injured party was present. The justice found the defendant guilty, assessed his fine at one dollar, and rendered a judgment against him for the fine and costs. Upon the rendition of the judgment, the same was fully paid by the defendant.

Was the defense thus proved, a bar to the prosecution in the Common Pleas? This is the only question in the case.

We have a statute which says: "Where any offense is committed in view of any justice, he may, by verbal direction to any constable, &c., cause such constable to arrest such offender, and keep him in custody for the space of one hour, unless such offender shall sooner be taken from such custody by virtue of a warrant issued on complaint on oath. But such person shall not be confined in jail, nor put upon any trial, until arrested by virtue of such warrant. 2 R. S. p. 497, § 4.

It is a settled principle, that when a statute confers a new power on a justice of the peace, he must proceed in the mode prescribed by the statute. *Bargis v. The State*,



4 Ind. R. 126.—*Bigelow v. Stearns*, 19 Johns. 39. Apply this rule to the case at bar, and it will at once be seen that there was, in this instance, no valid conviction before the justice. All he can do, when an offense is committed in his view, is to direct the arrest of the offender, who is to be kept in custody for the space of an hour, unless he shall be sooner taken from such custody by warrant issued on complaint on oath. Indeed, the enactment to which we have referred, in terms disallows the trial of an offender, arrested by such verbal direction, at least until he is charged by complaint under oath; and until such complaint is made, the person of the offender is not, for trial, within the jurisdiction of the justice. *Bargis v. The State*, *supra*, is directly in point, and decisive of the question under discussion. Our opinion is, that the justice—there being no complaint under oath—had no jurisdiction; that the conviction before him was, therefore, a nullity, and constituted no defense to the prosecution in the Common Pleas.

*Per Curiam*.—The judgment is affirmed with costs.

*J. O'Brian*, in person.

*J. N. Stiles*, for the state.

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APPEAL from the *Marshall* Court of Common Pleas. *Thursday, June 2.*

WORDEN, J.—Complaint by the appellant against the appellees, alleging the following facts, in substance, viz.: That *Stephens* mortgaged to *Blair* three tracts of land in *Marshall* county; that afterwards, *Stephens*, with the consent of *Blair*, sold two of them, and the proceeds were applied on the debt secured by the mortgage, and *Blair* released to the purchaser the lands thus sold, from the mortgage; that afterwards, *Blair* filed his bill to foreclose the mortgage in the *Marshall* Court of Common Pleas, in which action *Deavitt* appeared as the attorney of *Stephens*,



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and the facts as to the release of the two tracts of land, appearing to the Court by the admissions of *Deavitt* as counsel, a decree of foreclosure was ordered as to the remaining tract not thus released, for the balance due on the mortgage, and a memorandum was furnished the clerk, of the remaining tract thus ordered by the Court to be sold, but, by some mistake of the clerk, the decree was entered for the sale of all the land mentioned in the mortgage; that an execution issued on the judgment of foreclosure, on which *Deavitt* became replevin bail, whereupon the execution was returned; that upon the expiration of the stay thus taken, another execution issued, and on the day when the property was offered for sale, *Blair*, for the first time, discovered that the decree had been erroneously entered, and by his direction, only the remaining tract of land, not thus released from the mortgage, was sold; that after selling the last-mentioned tract, there remains a balance due on the judgment; that afterwards the plaintiff purchased the judgment from *Blair*, and took a written assignment thereof, a copy of which is set out; that, at the time of purchasing the judgment, the plaintiff had no notice whatever of the error or mistake in the entering thereof; that *Deavitt*, at the time he became replevin bail, had full knowledge of the release of the two tracts of land, &c., and that the Court only ordered the remaining tract to be sold, and of the mistake of the clerk in entering the judgment.

Prayer, that the mistake be corrected in the entry of judgment, so as to make it conform to the order of the Court, and that the executions issued thereon be also corrected, and for other relief.

*Stephens* made default. *Blair* appeared and answered, admitting the transfer of the judgment to the plaintiff, as alleged in the complaint. *Deavitt* demurred, assigning for cause, that the complaint did not state facts sufficient, &c., and that there was a defect of a parties plaintiff. The demurrer was sustained by the Court, and the plaintiff excepted. Final judgment for the defendants.

We are of opinion that the Court erred in sustaining



the demurrer to the complaint. On the facts set up, the plaintiff was entitled to have the judgment and executions amended, in order that upon exhausting the property not thus released from the mortgage, he could proceed against the other property of the defendant, or, if need be, against that of the replevin bail. The replevin bail is shown to have been fully cognizant of the fact that the two pieces of land had been released from the mortgage, and the order of the Court in the premises, and it is but equitable that the amendment should be made as against him, as well as against *Stephens*, the judgment-debtor. All Courts possess inherent power to correct clerical mistakes in their proceedings. *Silner v. Butterfield*, 2 Ind. R. 24. See, also, *Lippencott v. Wygant*, *id.* 661; *M Manus v. Richardson*, 8 Blackf. 100. This was a mere clerical error which should have been amended. The action is well brought in the name of the plaintiff. By the assignment of the judgment to him, as averred, he became the real party in interest, and as such, was entitled to sue under § 3 of the code. Perhaps the legal title to the judgment did not, by the assignment, pass to the plaintiff, so as to prevent a subsequent transfer to an innocent purchaser, or so as to affect the validity of a payment to *Blair*, the judgment-creditor, for the reason that the assignment was not on, or attached to, the entry of the judgment, nor attested by the clerk, as is provided for by the statute. 2 R. S. p. 335. But the assignment to the plaintiff vested in him the equitable interest in the judgment, and authorized the suit in his own name. *Mewherter v. Price*, 11 Ind. R. 199.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded with instructions to the Court to overrule the demurrer.

*J. Bradley, A. L. Osborn, and C. H. Reeve*, for the appellant.

*A. G. Deavitt*, for the appellees.

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CUTTER and Another *v.* EVANS.

THE INDIAN-  
APOLIS, &C.,  
RAILROAD CO.

*v.*  
BROWER.

Thursday,  
June 2.

APPEAL from the *Allen* Court of Common Pleas.

*Per Curiam*.—Bill to foreclose a mortgage. Decree for the plaintiff. The only error assigned is the refusal of the Court to grant a new trial. The note, assignment thereof, and mortgage, were given in evidence, and were all the evidence. They sustain the judgment. No reason is assigned why the judgment should be reversed.

The judgment is affirmed with 10 per cent. damages and costs.

*L. C. Jacoby*, for the appellants.

*W. March*, for the appellee.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY *v.*  
BROWER.

The party on whose behalf an assessment of damages is made, must tender the amount assessed before the right of entry can arise; and if it should be important that entry should be made before an appeal from the assessment can be disposed of, the party entering will not be precluded from further litigating the amount of damages by making such tender as would, under the constitutional provision, authorize him to enter. The tender should be the full amount of the assessment. The fact that it is accepted, will not change the rights of the parties.

Thursday,  
June 2.

APPEAL from the *Dearborn* Circuit Court.

HANNA, J.—The appellants, in pursuance of the statute, filed a petition before a justice of the peace, on the 12th of *May*, 1855, praying the appointment of twelve men to assess the damages, if any, which would be occasioned by the construction of a proposed extension of the road of the appellants over the described lands of said appellee.

On the 22d of the same month, the persons summoned in pursuance of said application, returned an assessment



of damages in favor of said appellee, which was entered by the justice, and judgment rendered thereon in favor of said appellee for the amount thereof, to-wit, 2,500 dollars. On the 6th of *June*, the appellants paid, and the appellee received, the said assessment, and receipted therefor on said judgment.

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v.  
BROWER.

On the 18th of *June*, the appellants filed bond and appealed to the Circuit Court.

These facts all appear upon inspection of the transcript of the justice.

In the Circuit Court, the appellee appeared and moved the Court, upon affidavit and written causes filed, to dismiss the appeal.

The affidavit shows, in addition to the above facts, that, before said appeal was taken, the appellants had taken possession of the lot named, and still held possession, and had removed the building of plaintiff and constructed the contemplated road.

The Court dismissed the appeal.

The only question in the case arises upon that ruling.

It is insisted that if an appeal is permitted in this case, it is at the expense of the 21st section of the bill of rights of our state constitution, which provides that no man's property shall be taken by law, &c., without compensation first assessed and tendered; that upon such assessment and payment, to the satisfaction of the owner of the land, the applicant is at liberty to enter immediately upon the land thus condemned; and that the payment of the amount assessed, followed by the entry upon the land, was a virtual acquiescence in the determination arrived at.

We do not view it in that light. We think that, under the provision of the constitution referred to, it was the duty of the appellants to tender the amount assessed, before the right to enter could arise; if it was important, to the interest of the appellants, that the entry should be made immediately, before an appeal from the judgment upon the assessment could be finally disposed of, we think the party seeking to make the entry would not be precluded from further litigating the amount of the damages by mak-



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ing such a tender as would, under the constitutional provision, authorize him to enter on the lands. The tender, at that stage of the proceedings, would have to be the full amount of the assessment. We do not think the fact that the defendant accepted the tender, changes the rights of the parties. *Louderback v. Rosengrant*, 4 Ind. R. 564.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Ryman* and *B. Spooner*, for the appellants.

*A. Brower* and *D. S. Major*, for the appellee.

#### ANDERSON v. THE NEWCASTLE AND RICHMOND RAILROAD COMPANY.

It cannot be pleaded to a complaint upon a subscription of stock, that at the time it was made there was no such corporation, because the defendant is estopped by his contract to deny the corporation, and because, under the general railroad law, subscriptions of a certain amount of stock are necessary for the organization of a contemplated corporation, and for that reason and purpose are valid before such organization, and may be collected afterwards.

The defendant, in a suit upon a subscription of stock, cannot set up a secret, fraudulent arrangement by which other subscribers were to have stock upon terms different from those specified in the contract. Such arrangements are of no avail to the parties in whose behalf they are made.

Thursday,  
June 2.

APPEAL from the *Cass* Circuit Court.

PERKINS, J.—Suit upon a subscription of stock to *The Newcastle and Richmond Railroad Company*.

The article of subscription was as follows:

*"Newcastle and Richmond Railroad Company.* We, the undersigned, promise to pay *The Newcastle and Richmond Railroad Company*, on their extension of said road from *Newcastle to Logansport*, the sum of fifty dollars for each and every share of stock by us subscribed, to be expended on the same, from the point where the same may be located, crossing *The Indianapolis and Bellefontaine Railroad*, to *Logansport*, in such installments as may be or-



dered by the directors of said company. And we hereby authorize and empower *William Chase* to transfer each share of stock by us subscribed to the regular subscription book of said company.

Subscribers' Names.	No. of Shares.	Amount.
<i>P. Anderson.</i>	4.	\$200."

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The defendant answered, admitting the subscription, but averring—

1. That at the time of making the same, there was no such corporation as that named in the subscription paper.

This answer was bad, because the defendant was estopped by his contract to deny the corporation; and because, under the general railroad law, subscriptions of a certain amount of stock are necessary for the organization of the contemplated corporation, and for that reason and purpose are valid, before the corporation is organized, and may be collected by it, after organization. The answer does not deny that such organization had taken place before this suit was brought. See *The Covington, &c., Plankroad Co. v. Moore*, 3 Ind. R. 510; *Judah v. The American, &c., Co.*, 4 *id.* 333.

2. That the stock was subscribed on condition that the road should be first extended to *Logansport*; and that the road had not been so extended.

This answer was bad, because it set up a false interpretation of the written subscription. It was not a condition of the subscription that the road should be extended to *Logansport*; for the very money subscribed was to be expended in making the extension. The instrument means that the stock is subscribed in, or for, that extension. See *The New Albany, &c., Railroad Co. v. Pickens*, 5 Ind. R. 247.

3. That the subscription was obtained by fraud in this, to-wit, that two men, *Taber* and *Walker*, were permitted to subscribe each 20,000 dollars in stock, under a secret arrangement with the directors, that they should be released from a part of said subscription after others had been induced by it to subscribe; and that, on the other



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part, they should have an extension of time of payment for five years.

Since railroad stocks have depreciated, and railroad schemes have become less popular than they formerly were, it is becoming common to set up fraud in obtaining the subscriptions, as a ground of avoiding their payment, and difficult questions are often thus presented. Representations, which, in the feverish excitement produced by an extraordinary temporary success, seemed to all as probably below the promised reality, now, in the ebbing of the railroad tide to a lower stage than is natural, appear like stupendous attempts at swindling. And means then resorted to to obtain subscriptions of stock, which the deluded no doubt sincerely thought justified by the supposed certain profitable result, now, in more sober times, shock the moral sensibility of every right-minded man.

But when these questions are presented to the Courts, they must sift the exaggerated representation from the deliberate assertion of a material fact, of which the subscriber had not the means of knowledge, and for the truth of which he rightly relied upon the solicitor of stock, authorized to assert it for his principal; they must separate the fraudulent device of which the subscriber was innocent, from those in which he participated; in short, they must decide upon railroad—upon corporation contracts, under the guidance, and in the application of the established rules governing their action upon contracts in other cases, and between private individuals.

These questions have been raised, and more or less discussed, and, to some extent, decided, in the following, among other cases, in this Court: *The Newcastle, &c., Co. v. Bell*, 8 Blackf. 584; *Judah v. The American, &c., Co.*, *supra*; *The Southern Plankroad Co. v. Hixon*, 5 Ind. R. 165; *The Western Plankroad Co. v. Stockton*, 7 *id.* 500; *The New Albany, &c., Co. v. Fields*, 10 *id.* 187; *Johnson v. The Crawfordsville, &c., Co.*, 11 *id.* 280; *Keller v. Johnson*, *id.* 337. The principles decided in the four latter cases go far beyond the line by which this case is bounded.



*Taber* and *Walker* could not avail themselves of the secret, fraudulent agreement, upon which they subscribed their stock. They were bound for the whole of it, according to the terms of the open, general, written subscription; and, hence, this defendant was not injured by their secret fraudulent agreement.

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1859.

GALLETTLEY  
v.  
BARRACK-  
MAN.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*H. P. Biddle*, for the appellant.

*D. D. Pratt* and *S. C. Taber*, for the appellees.

GALLETTLEY v. BARRACKMAN, Administrator.\*

APPEAL from the *Greene* Court of Common Pleas. *Thursday, June 2.*

*Per Curiam*.—There is not such an assignment of errors in this case as enables us to look into it. It was an application by an administrator for a proper order, &c., to authorize him to sell real estate of the deceased, for the payment of debts. Defense was made by the heir. Order of sale made. The only assignment of errors is, that the judgment should have been for *Gallettley*, and not for *Barrackman*. *Abraham v. Chase*, 11 Ind. R. 513.—*Id.* 536.—2 R. S. p. 161.

The appeal is dismissed at appellant's cost.

*D. Wallace*, *J. Coburn*, and *H. L. Livingston*, for the appellant.

*H. C. Newcomb* and *J. S. Tarkington*, for the appellee.

\* The case of *CHARLES* and *Another v. SKILLEN* was this day dismissed for the same reason.



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SIMONTON  
v.  
THE HUNTINGTON, & C.,  
PLANKROAD  
COMPANY.

SIMONTON v. THE HUNTINGTON AND LIBERTY MILLS  
PLANKROAD COMPANY.

Cause tried *October 12, 1855*. Order by the Court, upon overruling a motion for a new trial, that the defendant should file his bill of exceptions to that ruling in sixty days. Bill filed *January 4, 1856*. There was nothing to show that it was then filed by leave of Court. *Held*, that the errors assigned could not be considered.

Thursday,  
June 2.

APPEAL from the *Wabash* Court of Common Pleas.

HANNA, J.—This was a suit upon a subscription of stock. Judgment for the plaintiff.

Many errors are assigned, based upon the rulings of the Court, as set forth in a bill of exceptions referred to by the appellant as a part of the record.

The case appears to have been tried about the 12th of *October, 1855*. The Court, upon overruling a motion for a new trial, ordered that the defendant should file his bill of exceptions to that ruling, in sixty days. The defendant filed a paper of that character on the 4th of *January, 1856*, which is incorporated in the record as a part thereof; but there is nothing showing that it was then filed by leave of the Court.

In *Bradstreet ex parte*, 4 Peters, 102, it is said by the Supreme Court of the *United States*, that, "If the party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term, must be understood to be a matter of consent between the parties, unless the judge has made an express order in term, allowing such a period to prepare it."

The reason given in that case for requiring bills to be signed in such time is, that "It would be dangerous to allow a bill of exceptions of matters dependant on memory, at a distant period, when he [the judge] may not accurately recollect them. And the judge ought not to allow it."

This ruling is followed in 4 How. 4, and 16 *id.* 14.

The reasoning is applicable in the case at bar. Our



statute, 2 R. S. p. 115, requires that "The party objecting to the decision, must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the Court."

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BRUTCH.

Under this statute, the time fixed by the judge must be reasonable, and within that period the bill should be prepared and submitted to the judge, and not afterwards. If submitted to him afterwards, he is not, under ordinary circumstances, obliged to sign it, but if he does so, it can be filed only upon leave given.

Under this view of the case there is nothing before us, upon the assignment of errors, for our consideration.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*J. U. Pettit* and *C. Cowgill*, for the appellant.



#### THE STATE on the relation of RICHARDVILLE, Administrator, v. BRUTCH.

If, by mistake, an item chargeable against an administrator, be not litigated or examined in a suit upon his bond, and not embraced in the judgment, it may be recovered in another action on the same bond.

#### APPEAL from the *Knox* Circuit Court.

Thursday,  
June 2.

HANNA, J.—This was a suit by an administrator, against the surety of a former administrator of the same estate, upon a bond given by him to enable him to sell real estate.

The answer averred that the former administrator had legally and fully administered the assets which had come to his hands, &c., with the exception of 892 dollars, for which sum a judgment had theretofore been recovered against said defendant and his co-surety, &c., which had been fully paid, &c., and that it was the same cause, &c.

The reply admitted the recovery and payment of the judgment, &c., but averred that at the time said suit was



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v.  
BRUTCH.

instituted and judgment recovered, the reports, vouchers, &c., of said administrator, as made to, and received by the Common Pleas Court, showed a balance in the hands of said administrator of 892 dollars, and no more, for which sum, and no other, said suit was brought and judgment recovered; and that after the rendition of said judgment, such proceedings were had in said Common Pleas Court (to which defendant was a party), that one item and voucher of credit of 1,125 dollars, before that time allowed upon the credit side of the account of said administration, was thereby disallowed and rejected, which left the balance due from said administrator 2,017 dollars, 31 cents, and that the sum of 1,125 dollars was not examined or litigated in said former suit upon said bond, &c.

A demurrer was filed to said reply, alleging that it did not state facts sufficient, &c., which was sustained and exception taken. Judgment for the defendant.

This ruling presents the only question in the case.

We are of opinion that the reply was sufficient. The case of *Byrket v. The State*, 3 Ind. R. 248, is very much in point. In that case a recovery was permitted of items by mistake left out of a former judgment, in a suit on the same bond. In the case at bar, it is averred that the matter for which this suit was brought was not litigated or examined in the former suit. In other words, the reply, in effect, sets up that this suit is not for the same cause of action determined in that suit. See *Brandon v. Judah*, 7 Ind. R. 546.

The approval of the report of the administrator, and the allowance of the credit and voucher presented by him, by the Common Pleas Court, was *prima facie* correct, but not conclusive, when made in the course of his administration, and without adversary proceedings. The correctness thereof might be inquired into upon a proper case made. *Allen v. Clark*, 2 Blackf. 343.—*Brackenridge v. Holland*, *id.* 377. *Murdock v. Holland*, 3 *id.* 114.—*Sherry v. Sansberry*, 3 Ind. R. 320. But in the case at bar, it is affirmatively alleged that such inquiry was not made in the former suit upon the bond, even if it could have been done in that proceeding.



*Per Curiam*.—The judgment is reversed with costs. May Term,  
Cause remanded, &c. 1859.

*S. Judah*, for the state.

BALDWIN  
v.  
THE STATE.

## BALDWIN v. THE STATE.

An information is not bad for being signed by the district attorney with the official title of "prosecuting attorney," instead of "district attorney."

APPEAL from the *Cass* Court of Common Pleas.

Thursday,  
June 2.

HANNA, J.—This was a prosecution, by affidavit and information, in the Common Pleas Court. A motion was made to quash the information, which was overruled.

The only point made is upon that ruling of the Court.

The bill of exceptions taken shows, that the objection made to the sufficiency of the information was, because it was not filed by the proper prosecuting attorney.

The information states that "*John R. Flynn*, prosecuting attorney for *Cass* county, of the state of *Indiana*," &c., and is signed "*John R. Flynn*, prosecuting attorney."

It is urged that, by the statute, the official name of the officer who represents the state, in prosecutions in the Circuit Court, is, "prosecuting attorney;" and that that of the officer who discharges somewhat similar duties in the Common Pleas Court, is, "district attorney;" and, therefore, so far as appears by this information, it was presented by an officer who had no authority to discharge that official act in that Court.

By our statute (2 R. S. p. 367, § 54), it is provided that, the information must contain, among other things, "the title of the action, specifying the name of the Court to which the information is presented;" and yet by the 61st section of the same act, it is provided that no information may be quashed, &c.—"*First*. For a mistake in the name of the Court or county in the title thereof;" and, "*Seventh*."



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ODELL  
v.  
STEPHENS.

For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Now, although it is provided by statute that the information shall be signed by the officer presenting it, yet we cannot perceive that a mistake in affixing to his signature his proper official designation, could prejudice the substantial rights of the defendant, upon the merits, to any greater extent than a failure to properly name the Court, as required in one portion of the statute.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*L. Chamberlin*, for the appellant.

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ODELL v. STEPHENS.

Thursday,  
June 2.

APPEAL from the *Johnson* Circuit Court.

*Per Curiam.*—*Stephens* sued *Odell* for the seduction of his daughter, one *Elizabeth Stephens*, whereby he lost her services, &c. Verdict for the plaintiff. New trial refused, and judgment.

During the trial, the said *Elizabeth* was produced, and having testified that defendant had illicit intercourse with her in the plaintiff's house, he, the plaintiff, asked her to state the inducements under which the illicit intercourse took place, and whether there was any promise of marriage between witness and defendant. To this question, the defendant objected, but the Court, over the objection, decided that plaintiff might prove that defendant, before the illicit intercourse occurred, did promise to marry said *Elizabeth*, as evidence of seduction, but not as evidence to enhance the plaintiff's damages, or to affect the same. And the witness was, accordingly, permitted to testify that defendant did promise to marry her, and that she assented thereto, before the seduction.



For the purpose indicated, the evidence was unobjectionable. The plaintiff, it is true, would have no right, in this action, to recover for the breach of the marriage contract; but to prove the seduction, the evidence was plainly admissible.

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LEMASTERS  
v.  
JOHNSON.

The judgment is affirmed with 3 per cent. damages and costs.

*M. M. Ray* and *T. A. McFarland*, for the appellant.

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LEMASTERS and Wife v. JOHNSON.

Where there were two plaintiffs, and the record stated that the "plaintiff" excepted, it was *held* that the exception was good—the omission of the final *a* being a clerical error.

Where a judgment was rendered upon an agreement waiving appraisement laws, and a sale made pursuant thereto, under §§ 3, 4, Acts 1843, p. 52, without appraisement, it was *held* that the Court would presume that the consideration of the agreement arose after *June 1, 1843*; and that the sale was properly made without appraisement.

By that statute, if an execution-defendant was unable to replevy the judgment, he was entitled to have the property sold on a credit of the same length as the stay which he was unable to obtain; but if he neglected to inform the officer of such inability, and failed in any way to claim the right to a sale on credit, it was *held* to be waived.

APPEAL from the *Johnson* Circuit Court.

Thursday,  
June 2.

WORDEN, J.—Complaint by *Lemasters* and wife against *Johnson*, filed at the *September* term, 1856, averring in substance, that on the 18th of *March, 1847*, said *Lemasters* executed to one *John Alexander* his promissory note, waiving appraisement laws, for the sum of — dollars, and that he and his wife at the same time executed to *Alexander* a mortgage on certain real estate therein described, to secure the payment thereof; that on the 15th day of *September, 1849*, *Alexander* obtained a decree in chancery in said Court against said plaintiffs, for the foreclosure of the mortgage, and the sale of the mortgaged premises, which sale was to be made, as specified in the decree, without



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any relief whatever from valuation or appraisement laws, and as upon judgments at law, which said decree the defendants in said suit (plaintiffs herein), were then and there, and for more than six months after the rendition thereof, continued to be, unable to stay or replevy; that afterwards, viz., on the 9th of *December*, 1849, execution was issued on the decree, and delivered to the sheriff, by virtue of which the sheriff, having duly advertised the premises for sale for cash, proceeded on the 9th of *February*, 1850, to sell said premises, and did, then and there, sell the same at public auction for cash, the same being struck off and sold to said *John Alexander* for the sum of 350 dollars, which purchase-money was then and there paid, and a conveyance made by the sheriff, in pursuance of the sale; that afterwards, on, &c., *Alexander* conveyed the premises to said *Grafton Johnson*, who is now in possession of the premises, and claims title thereto under said purchase; that *Johnson*, at the time of his purchase from *Alexander*, had full notice of the character of *Alexander's* title, and of the irregularities and illegalities of the sheriff's sale; that *Alexander*, on, &c., died testate; that the sheriff's sale is void, having been for cash down, when there should have been given a credit for six months from the rendition of the decree; that said sale was void, having been made without an appraisement, &c.; that before the commencement of this suit, and before the death of *Alexander*, on, &c., the plaintiffs tendered to *Alexander* the purchase-money, &c.

Prayer that the sale and conveyance made by the sheriff be set aside, and for further relief.

To this complaint a demurrer was filed, which was sustained by the Court, to which ruling the plaintiffs excepted, and there was final judgment for the defendant.

The plaintiffs appeal to this Court, and assign for error the sustaining of the demurrer.

A point is made by counsel for appellee, that no sufficient exception appears to have been taken to the ruling below. The record shows that "the plaintiff" (in the singular) excepted. It is insisted that, as there were two plaintiffs, it is uncertain which of them excepted, and that



in such uncertainty, the cause should be treated as if no exception had been taken. We do not so regard the matter. We view the omission of the final s, denoting the plural, as a mere clerical omission which should not deprive the plaintiffs, or either of them, of the benefit of their exception.

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LEMASTERS  
v.  
JOHNSON.

Does the complaint state facts sufficient to constitute a cause of action?

This question must be answered by reference to the provisions of the statute by which the sale in question is supposed to be rendered illegal.

The second section of an act to require the bank to continue specie payment, &c. (Acts of 1843, p. 52), provides for a stay of execution for a period of six months from the date of judgment, in certain cases, on security being given, and for the sale of property to the highest bidder, without appraisement. The third and fourth sections are as follows:

"Sec. 3. From and after the first day of *June* next, if any person or persons, for a consideration arising wholly after that time, shall agree in writing to pay any sum of money without any relief whatever from valuation or appraisement laws, judgment shall be rendered accordingly, and after the same stay provided in the foregoing section, if sufficient security be given, and if not immediately, property may be taken on execution, and sold as is therein provided.

"Sec. 4. That whenever any person or persons are unable to procure his, her, or their judgment or judgments to be replevied under the provisions of this act, his, her, or their property shall be sold under the same length of credit that he, she, or they would be entitled to stay said judgment, which judgment bond shall be given to the officer effecting the sale, on which execution may issue when due, and property, when levied on to satisfy said bond, shall sell without appraisement, as other property under this act."

The sale in question was properly made without appraisement, as the order of the Court, in that respect, followed the contract, and such order was conclusive that the



May Term, 1859. consideration arose wholly after the first day of *June*, 1843.  
*Doe v. Craft*, 2 Ind. R. 359.

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 V.  
 JOHNSON. From what is averred in the complaint, should the property have been sold on a credit?

In our opinion there is not enough alleged in the complaint to show that the property should have been thus sold.

Upon the decree being rendered, the defendants had the right to take the stay of six months, as provided by the law. They did not do it; but it does not, therefore, follow that they were unable to do it; hence, neither the officer having the execution, nor the execution-plaintiff, was required to know whether the defendants' neglect to take the stay, arose from inability or otherwise. Parties frequently neglect to take a stay of execution when they are abundantly able to procure the necessary surety. When the execution issued to the officer, the defendants had a right to stay it in his hands, by furnishing the necessary security; and if they were unable to do so, and desired the property to be sold on a credit equal to the stay, they should have informed him of that fact, and requested the sale to be made accordingly. By being entirely passive, and not making known to the officer their inability to stay the execution, and not, in any manner, claiming their right to have the property sold on a credit, we think such right was waived.

The complaint simply avers the inability of the parties to take the stay, without showing that the plaintiff in the judgment, or the officer having the execution, was apprised of that fact; or that the defendants took any steps to avail themselves of their right to have the property sold on a credit, and, in this respect, it is fatally defective.

Other objections to the complaint are urged, but as the foregoing is decisive, it is unnecessary to notice them.

*Per Curiam*.—The judgment is affirmed with costs.

*G. M. Overstreet* and *A. B. Hunter*, for the appellants.

*D. M. Donald*, *F. M. Finch*, and *A. G. Porter*, for the appellee.



## BLACKLEGE v. BENEDICK and Others.

May Term,  
1859.JONES  
v.  
JONES.APPEAL from the *Franklin* Court of Common Pleas.

PERKINS, J.—Suit against the indorser of notes payable at a bank. The complaint did not allege a presentment of the notes at the bank for payment, protest, and notice, &c., nor an excuse for the failure to do so. It alleged that the notes, at the date of the commencement of the suit, were lost. Judgment by default.

Thursday,  
June 2.

The contract of an indorser of a note payable at bank, is, that he will pay it on failure of the maker to do so on proper presentment and demand, if he, the indorser, is duly notified of such failure of the maker.

Such demand, failure, and notice, where no legal excuse for failure to demand, &c., exists, are a condition precedent to the liability of the indorser, and a complaint which fails to aver these facts, in a suit against the indorser, does not state facts sufficient to constitute a cause of action. This objection to a complaint is good on appeal. See *Havens v. Talbott*, 11 Ind. R. 323; Chit. Pl. 328; How. (N. Y.) Code, 193; *Slacum v. Pomery*, 2 Cond. (U. S.) Rep. 351; Byles on Bills, top p. 669.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded with instructions to set aside the default, and give the plaintiff leave to amend.

*L. Barbour* and *J. D. Howland*, for the appellant.

*G. Holland* and *C. C. Bradley*, for the appellees.

## JONES and Others v. JONES.

APPEAL from the *Shelby* Circuit Court.Thursday,  
June 2.

*Per Curiam*.—This was an action by the appellee to recover a tract of land of which his son died seized, in September, 1852. Judgment for plaintiff.



May Term,  
1859.  
OVERSTREET  
v.  
FREEMAN.

The appellants, as brothers and sisters of the deceased, claimed one-half of the land. The land had been deeded by the appellee to his son. The deed expressed on its face that the land was so conveyed for the consideration of 1,000 dollars. The appellee alleged and offered to prove that the consideration was natural love and affection.

This was objected to, as tending to contradict and vary the deed; but the evidence was admitted. This presents the only point in the case; for, if the land was a gift from the father, it again became his upon the death of his son without children, &c., under the 5th subdivision of § 114, R. S. 1843, p. 436, which was in force at the time of his death. If the deed from the father to the son was conclusive evidence of the consideration, and could not be contradicted, then the appellants were entitled to one-half the property, &c. *Id.* § 111.

This question has, in effect, been already settled by this Court. *Rockhill v. Spraggs*, 9 Ind. R. 30.

The judgment is affirmed with costs.

*C. Wright, M. M. Ray, and T. A. McFarland*, for the appellants.

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OVERSTREET v. FREEMAN.

Friday,  
June 3.

APPEAL from the *Johnson* Court of Common Pleas.

PERKINS, J.—*George Freeman* sued *William H. Overstreet*, on an account assigned to said *George* by *John C. Freeman*, thus:

"*William H. Overstreet* to *John C. Freeman*, Dr: To 81,438 staves, at 5 dollars, 50 cents, per 1,000, \$447.85. [Indorsed.] For value received, I, *J. C. Freeman*, assign all my interest in the above account to *George Freeman*, without recourse on me, this 6th day of *January*, 1857.

*John C. Freeman.*"

*John C. Freeman*, the assignor, was not made a party;



nor was any objection taken to the complaint on account of the omission. But the assignment was in writing, not by delivery. This, however, cannot change the rule as to parties, because an account is not made assignable by statute, by indorsement, so as to vest the legal title. The assignment in writing, therefore, is but an equitable assignment.

May Term,  
1859.

OVERSTREET  
V.  
FREEMAN.

In a complaint upon such account and assignment, the interest of the plaintiff must be averred, as well as the indebtedness of the defendant; and while the written account itself cannot be regarded as the foundation of the action, like other written instruments, it would seem that the written assignment of it might be set out and filed with the complaint, as other written instruments, so that, not being denied on oath, it would be admitted. The account itself, however, would have to be proved. The assignment, being a formal written instrument, signed by the party, would seem properly to stand on the footing of other written instruments.

Answer, in denial of the account, with special paragraphs of payment, set-off, &c. Trial by the Court, and judgment for the plaintiff.

On the trial, *John C. Freeman* was admitted as a witness without objection, so far as appears by the record.

No question of law has been properly raised except as to the right of an assignee of an open account to sue on it in his own name. Of this we have no doubt. *Strong v. Clem*, at this term (1).

On the weight of evidence, we cannot reverse the judgment.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*S. P. Oyler* and *F. M. Finch*, for the appellant.

*G. M. Overstreet* and *A. B. Hunter*, for the appellee.

(1) *Ante*, 37.



May Term,  
1859.

SHAW  
v.  
BREESSE.

Friday,  
June 3.

HOLMES and Another v. EBERSOLE and Another.

APPEAL from the *Huntington* Court of Common Pleas.

PERKINS, J.—Suit upon promissory notes. Answer, that the notes were given for the consideration of spirituous liquors sold to defendant in 1856, which liquors were not sold for sacramental, &c., purposes.

Demurrer to the answer overruled. Judgment for the defendants.

The judgment was clearly erroneous. The sale of the liquors was not illegal, and was a sufficient consideration for the notes.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, with instructions that the demurrer be sustained.

*H. C. Newcomb, J. S. Tarkington, and I. De Long*, for the appellants.

### SHAW v. BREESSE.

If a *feme covert*, owning real estate, die intestate without issue, and without a surviving parent or parents, but leaving her husband surviving her, the entire estate descends to the husband.

Friday,  
June 3.

APPEAL from the *Delaware* Circuit Court.

PERKINS, J.—Complaint for partition. Partition adjudged.

The facts are, that *Moses Breese*, on the 18th of *May*, 1842, conveyed by a deed with usual covenants, in consideration of love and affection, to his daughter, *Caroline Breese*, the tract of land of which partition was asked. In 1855, said *Caroline* intermarried with *George Shaw*. In 1857, she died intestate, leaving no children nor father nor mother.



Her brothers and sisters living, and the descendants of those deceased, now claim the whole, or some part, of said tract of land, under the statute of the state regulating descents. The husband, also, claims it under the same statute.

May Term,  
1859.

SHAW  
v.  
BRIDGE.

The statute provides (§ 26, 1 R. S. p. 251) that, "If a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor."

It appears, from the statement of facts above, that this case exactly fills the conditions of the section of the statute quoted, under which the whole property goes to the surviving wife or husband.

But it is contended that this section is to be modified by construction; that it was intended by the legislature that it should be taken in connection with other sections of the statute of descents. We do not deny the rule of construction, but see nothing in the statute that will change the effect of § 26 upon the application of the rule.

The statute of descents varies to meet cases. Upon one set of facts, the property descends in one mode, upon another set, in another. These different cases are met and provided for by different sections.

From § 1 to § 6 inclusive, the provisions may be regarded as enacted upon the hypothesis that there is no surviving wife or husband.

Section 7 may have been enacted upon the hypothesis that though there were no children, yet there might be a father or mother to whom the property might descend; and, as against them, in the state of facts assumed in the section, the property should revert to the donor.

In the cases met by the 26th section, there is neither children nor father nor mother, but there is a surviving husband or wife. In all such cases, the whole property, after payment of debts, goes to the survivor. If there was a doubt as to the construction we have put upon the sections, we should be compelled to throw that doubt in favor of the surviving husband or wife; as § 15 of the statute enacts that—



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1859.

CONKLIN  
v.  
FINNELL.

"Every rule of descent or distribution prescribed by this act shall be subject to the provisions made in behalf of the surviving husband or wife of the decedent."

*Per Curiam*.—The judgment is reversed with costs. Let the petition be dismissed.

*W. March*, for the appellant.

*C. M. Anthony*, for the appellee.

CONKLIN and Others v. FINNELL and Another.

Friday,  
June 3.

APPEAL from the *Fayette* Circuit Court.

PERKINS, J.—Suit upon a bill of exchange. The complaint was filed on the 15th day of *September*, 1855, being the sixth judicial day of the then term. On the filing of the complaint, *Nelson Trusler*, Esq., an attorney of that Court, appeared for the defendants, and filed and proved a warrant of attorney, authorizing him to confess judgment against the defendants for the sum of 2,101 dollars, with interest from date, and costs. The warrant was dated *August 21*, 1855. It did not describe the cause of action, but it did the parties to the suit. The judgment was rendered for the correct amount.

It would have been better if the warrant of attorney had particularly described the cause of action, so that it might have plainly appeared that it was intended to be applied to the suit in which it was used. But we think the defendants cannot complain, as, if it was not intended for the suit in which it was used, there may be one less judgment against them, than otherwise might be.

The bill of exchange set out in the complaint, contained a waiver of valuation laws. The warrant of attorney did not; but as we must take it that it was to be applied to the cause of action described in the complaint, the judgment was properly rendered without benefit of appraisal laws.



*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

May Term,  
1859.

*N. and G. Trusler and J. M. Wilson*, for the appellants.

*B. F. Claypool*, for the appellees.

LAKE  
v.  
JARRETT.

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LAKE and Wife v. JARRETT and Others.

19 305  
120 303

Although parties may be willing and competent to make partition of their lands among themselves, yet either of them may commence proceedings for partition under the statute, without first making an effort for an agreement upon the terms of partition without such proceedings.

Where the Court ordered commissioners to set apart to each of the parties to the proceeding for partition one-fifth of the premises, the commissioners reported that the land was not susceptible of partition, without great detriment to the parties, and recommended a sale according to law. The defendants objected to the sale, and protested against the sale of their part, and asked that it might be set off. The objections to the report were, 1. That it was untrue. 2. That it did not set forth the facts upon which the opinion of the commissioners was based. But the Court overruled the objections and ordered the sale.

*Held*, 1. That if the meaning of the report was, that the partition could not be made into fifths, as ordered, the Court erred in ordering the defendants' part to be sold, without a report showing that their part could not be divided from the rest without detriment, &c.; but if the report meant that the defendants' share could not be so set off to them, then the second objection of the defendants to the report should have been sustained.

2. That the report would have been sufficient, in the absence of any objection.

APPEAL from the *Wayne* Court of Common Pleas. *Wednesday, June 8.*

WORDEN, J.—Petition for partition by the appellees against the appellants. The property sought to be partitioned was a quarter section of land, one-fifth of which belonged to each of four of the petitioners, and one-fifth to the defendants. Prayer, that partition be made between the parties plaintiff and defendant, according to their respective rights.

The defendants answered that they had never refused to make partition of the estate, &c., but have, at all times, been willing and anxious to make the same, and are now



May Term, 1859. willing, as the owners are competent to do, without applying to this Court, and that the plaintiffs have refused to do so, wherefore, &c.

**LAKE**  
**v.**  
**JARRETT.**

A demurrer was sustained to this answer, and we think correctly. Although the parties might be perfectly willing to make partition, yet they might not be able to agree upon the manner of doing it. The statute, we think, authorizes the proceeding, although some, or all, of the parties in interest, are willing to have partition made. Although the parties may be willing and competent to make partition amongst themselves, yet they are not required to make an effort to agree upon terms, before proceedings can be instituted by either of them, for a partition under the statute.

The Court awarded partition as prayed for, and appointed commissioners to set apart to each party his respective one-fifth part of the premises.

The commissioners reported "that after careful survey and examination of the lands aforesaid, and after due deliberation upon the premises, they are of opinion that the land aforesaid is not susceptible of partition without great detriment to the interests of the parties concerned; and they therefore recommend that the land be appraised and sold according to law, for the benefit of said heirs."

The defendants filed their written objections to the report of the commissioners, so far as the sale of the property was concerned, and protested against the sale of their share thereof, and asked that it might be set off to them from the residue, by proper partition.

The objections to the report are, first, that it is not true; and, second, that it does not set forth the facts upon which the opinion of the commissioners is based.

These objections the Court overruled, and ordered the land to be sold, exception being properly taken.

It is doubtful whether the report of the commissioners, although its language is general, should be construed to mean that, in their opinion, the land could not be divided by setting off the share of the defendants by itself, and the shares of the plaintiffs all together, thus dividing the



land into two unequal parts. The more natural interpretation would be, that in their opinion it could not be divided into the five parts, as specified in the order of the Court directed to them.

The 18th section of the act on the subject (2 R. S. p. 332), provides that, "When such commissioners shall report to the Court, that the whole or part of the lands of which partition is demanded, cannot be divided without damage to the owners, the Court, in its discretion, may order the whole, or such part of the premises to be sold. \* \* \* And if part only be sold, the remainder may be partitioned, subject to the rules hereinbefore provided."

This provision clearly contemplates a sale of a portion of the land, and a partition of the residue, in a proper case. If the report of the commissioners is to be construed to mean that the land could not be divided as ordered by the Court, viz., into five parts, without great detriment, &c., and not that it could not be divided by setting off to the defendants their portion, then we think the order of the Court was wrong, in directing a sale of the defendants' share, without any report showing that their share could not be divided from the rest without detriment to the parties. On the other hand, if the report is to be regarded as passing upon the susceptibility of a division by setting off to the defendants their share, then we are of opinion that the objection taken, that it did not set forth the facts upon which the commissioners based their conclusion, should have prevailed. The report would probably have been entirely sufficient had no objection been taken; but having been taken the objection should have been sustained. The Court had a discretion to exercise, as to the order which it should make in the premises, and in such case, the facts should have been reported, that such discretion might be exercised properly. This view is fully sustained by the case of *Tucker v. Tucker*, 19 Wend. 226, where such objection was allowed to prevail. *Vide*, also, *Lacoss v. Keegan*, 2 Ind. R. 406.

We are of opinion that the order of the Court for the sale of the whole premises was erroneous, and that it must

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JARRETT.



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1859.

GILLISPIE  
v.  
THE FORT  
WAYNE, & C.,  
RAILROAD CO.

be reversed. It should, perhaps, be remarked that the appeal in this case was properly taken as from an interlocutory order.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for further proceedings not inconsistent with this opinion.

*G. W. Julian*, for the appellants.

*M. Wilson* and *C. H. Burchenal*, for the appellees.

GILLISPIE v. THE FORT WAYNE AND SOUTHERN RAILROAD COMPANY.

Wednesday,  
June 8.

APPEAL from the *Grant* Circuit Court.

*Per Curiam*.—Suit upon a promissory note given for a subscription of stock in *The Fort Wayne and Southern Railroad Company*.

There was an answer alleging that the note had been delivered to one *Jones*, who was authorized to collect it, and apply the proceeds upon a debt due from the company to him.

This answer showed the beneficial interest in the note to be in *Jones*, and a demurrer to it should have been overruled.

There were paragraphs of fraud and failure of consideration, and one of special *non est factum*, too evidently insufficient in their allegations to require notice.

The judgment is reversed with costs. Cause remanded, with instructions to proceed in accordance with this opinion.

*J. Brownlee*, for the appellant.

*R. T. St. John*, *A. Steele*, and *H. D. Thompson*, for the appellees.



## MOODY and Others v. WEST.

May Term,  
1859.MOODY  
v.  
WEST.

In 1835, in a proceeding for the partition of the lands of a decedent, certain land was assigned to the widow as her dower, and his lands, not being susceptible of partition, were ordered to be sold subject to the dower. The order of sale directed that the commissioners sell the land, excepting the widow's dower. The commissioners reported that they had made the sale excepting the dower, describing it by metes and bounds. The sale was confirmed, and a deed made purporting to convey to the purchaser all the interest of the heirs of the decedent in the premises, subject to the widow's dower.

*Held*, 1. That the order authorized the sale of the entire estate, subject to the widow's dower; and the reversion vested in the purchaser.

2. That the Court, under the statute of 1831, had authority to make such order; that the language of the statute is broad enough to convey estates in reversion as well as in possession.

APPEAL from the *Franklin* Circuit Court.Wednesday,  
June 8.

WORDEN, J.—Complaint by the appellants against the appellee to quiet their title to a certain piece of land. The defendant answered, setting up a title in himself. Trial by the Court, finding and judgment for the defendant.

The facts are, that in 1830, *John Lefforge* died intestate, leaving to his heirs certain lands, of which that in controversy is a part. Afterwards, in 1835, in a proceeding in the *Franklin* Probate Court for a partition of the lands of the deceased between his heirs, the land in dispute was set apart and assigned to his widow as her dower in his estate, and his lands were ordered to be sold (not being susceptible of an equitable partition) subject to the dower of the widow, which had been thus assigned to her. The order of sale directs that the "commissioners, or any two of them, proceed to sell the aforesaid land, in said report mentioned (excepting the widow's dower, which is set off to her as aforesaid), to the highest bidder," &c.

The commissioners made sale of the land to one *John Gant*, and reported that they had made such sale, "excepting the widow's dower in the premises," describing such dower by metes and bounds. The sale was confirmed and a deed ordered and made to the purchaser. The deed purports to convey to the purchaser all the interest of the heirs



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of the decedent in the premises, subject to the widow's dower.

The plaintiffs, as the heirs at law of the intestate, claim that the reversion in the property thus set apart to the widow for her dower, did not pass to the purchaser by such sale; but that upon the death of the widow, they will be entitled to the same as such heirs.

*West*, claiming under *Gant*, insists that by the sale and conveyance, the entire estate passed to *Gant*, subject merely to the life estate of the widow. This is the only question presented in the case.

We are of opinion that the order of sale was sufficient, in terms, to authorize the sale of the entire estate, subject to the widow's dower; and that the proceedings vested such interest in the purchaser, if the Court had authority to make such order.

The proceedings were had under the statute of 1831, to provide for the partition of real estate. *Vide* R. S. 1838, p. 426. Under this statute, the Court had power to make partition (and in a proper case to order a sale) "when two or more persons were proprietors of any real estate." This language is broad enough to cover estates in reversion as well as in possession, and, in our opinion, the proceedings were authorized by the statute.

It follows that the finding and judgment below are right.

*Per Curiam*.—The judgment is affirmed with costs.

*G. Holland* and *J. Ryman*, for the appellants.

*J. D. Howland* and *D. D. Jones*, for the appellee.

12	400
130	90
12	400
163	290

PIPER and Others v. THE CONNERSVILLE AND LIBERTY  
TURNPIKE ROAD COMPANY.

An appeal lies from the decision of the Circuit Court in a proceeding for the assessment of damages.



The general law providing for appeals to the Supreme Court (2 R. S. p. 158, § 550), repealed the provision of the statute (1 R. S. p. 395, § 7) making the decision of the Circuit Court final in such cases.

The Court, in this case, by agreement of parties, ordered that three viewers should examine certain premises, and assess the damage occasioned by the construction of the road through them, and that if they should desire to hear evidence they must notify the parties; and the parties acquiesced in the order. Two of the viewers did not desire to hear evidence; but made their report upon their examination of the premises.

*Held*, 1. That it could not be objected that the assessment was made without hearing evidence.

2. That the viewers were not a jury; that by the agreement to an assessment by viewers, the right to a jury was waived; that the action of a majority of the viewers was sufficient.

### APPEAL from the *Fayette* Circuit Court.

WORDEN, J.—This was a proceeding before a justice of the peace, by the appellees, to procure an assessment of damages sustained by the appellants in consequence of the running of the road of the company through the land of the appellants. An assessment was made before the justice, from which the appellants in this Court appealed to the Circuit Court. The proceedings were had under the provisions of the “act authorizing the construction of plank, macadamized, and gravel roads.” 1 R. S. p. 394.

In the Circuit Court, the cause came on for hearing before the Court, whereupon the Court, by the consent of the parties, appointed three disinterested resident citizens, as viewers to assess the damages, who were duly sworn, and by the agreement of the parties were permitted to view the premises, and it was ordered that, if before making their report, they should deem it necessary to hear the evidence of the witnesses subpoenaed, they should give notice to the parties respectively.

Two of the viewers thus appointed made their report, assessing the damages at 75 dollars.

The other one reported that he could not agree with his co-viewers as to the amount of damages to be assessed, and asked to be allowed, with the other viewers, to hear evidence touching the extent of injury and amount of damages, before making his final return.

The Court, on motion of the company, confirmed the

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NERSVILLE,  
&C., TURN-  
PIKE Co.

majority report, and rendered judgment in favor of the appellants for the sum thus assessed. Appellants moved for a new trial, but the motion was overruled and exception was taken.

The appellees make the point, that an appeal does not lie to this Court from the decision of the Circuit Court in such case. But this is settled the other way by the case of *The Indiana Central Railway Co. v. Atkinson*, 6 Ind. R. 149, and case there cited. It may be further observed in relation to this point, that although the statute on which these proceedings are based, provides that "the judgment of the Circuit Court shall be final between the parties" (1 R. S. p. 395, § 7), yet this statute was approved prior to the general statute providing for appeals to the Supreme Court. 2 R. S. p. 158, § 550. The statute last cited provides for an appeal from the Circuit and Common Pleas to the Supreme Court, from all final judgments, except in actions originating before a justice of the peace, or mayor of a city, where the amount in controversy exclusive of interest and costs, does not exceed 10 dollars. The language of this statute undoubtedly covers such a case as the present, and if there is any conflict between the two statutes, the latter must govern, as it would, by implication, repeal the former. Ind. Dig., p. 750, § 38.

The first error complained of is, that the viewers viewed the premises, and two of them assessed the damages, without hearing evidence as to the true amount of damages. There is nothing in this objection. The record does not show that the appellants offered any testimony, nor that they, in any manner, objected to the viewers examining the premises and making the assessment upon such examination, unless they themselves should wish to hear testimony as to the amount of damages. The Court made the order by the agreement of the parties, that the viewers should examine the premises, and if they should desire to hear evidence, they should notify the parties. This order was acquiesced in by the parties. Two of the viewers did not desire to hear evidence, and made their report upon their examination of the premises. We think it was then



too late to object that the assessment was made without hearing evidence. May Term,  
1859.

The second objection is, that the Court received and adopted the report of the majority of the viewers, without showing the cause of the absence of the other, and accounting therefor. This error is not true in point of fact, as the record shows that the third viewer was present and made his report, showing that he had acted with the others, but could not agree with them in the conclusion to which they had come.

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The third error assigned is, that as the viewers are to be regarded as jurors, their report or verdict must be unanimous, or it is a nullity; that otherwise the constitutional right of trial by jury would be violated.

Under the decision of this Court, in the case of *The Lake Erie, Wabash, and St. Louis Railroad Co. v. Heath*, 9 Ind. R. 558, the appellants, had they demanded it, would have been entitled to a jury trial, but they did not do so; on the contrary they, by agreement, consented to the appointment of viewers, as provided in the statute under which the proceedings were had. In the case above cited, the Court, in speaking of the constitutional provision in reference to the right of trial by jury, say that "It is a provision, however, which a party may waive. Had the defendant below, in this case, not demanded a jury, but acquiesced in the appointment of a new set of appraisers, the case would have stood like an ordinary one where a jury is waived."

The appellants having waived the right of trial by jury, and consented to the assessment of damages by viewers, under the provisions of the statute, it remains to inquire whether the action of the majority of those viewers is sufficient. This proposition seems to be settled by statute. In 2 R. S. p. 339, § 1, clause 2, it is provided that, "Words importing a joint authority to three or more persons, shall be construed as authority to a majority of such persons, unless otherwise declared in the law giving authority to such persons." We discover nothing in the law, under which the proceedings were had, providing for the appointment of viewers, by which it is "otherwise declared," and



**May Term,** we are, therefore, of opinion that the report of the majority  
**1859.** was sufficient.

**TARDY** The fourth and last error assigned is substantially the  
**v.** same as the third, and what we have said in relation to  
**HOWARD.** the third, disposes of it.

We see no error in the record sufficient to reverse the judgment.

*Per Curiam.*—The judgment is affirmed with costs.

*N. and G. Trusler, J. S. Reid, and S. Heron,* for the appellants.

*B. F. Claypool,* for the appellees.

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**TARDY v. HOWARD and Another.**

Complaint against *A. and B.* for unlawfully taking and detaining personal property. The property was delivered to the plaintiff, upon his giving an undertaking, &c. Answers, 1. In denial. 2. By *A.*, property in a stranger. 3. By *B.*, property in himself. Trial by jury; verdict as follows: "We the jury, find for the defendants."

- Held*, 1. That the verdict being general, embracing all the issues, it finds the property to be in *B.* and also in a stranger, and hence, is inconsistent with itself, and bad.
2. That the verdict did not authorize a judgment for a return of the property, because it did not determine the value of the property.
3. That the verdict amounts to nothing more than a finding for the defendants on their denial of having taken the property; and that, in this view, the objection for inconsistency is obviated, and the verdict may stand, if the defendants see proper so to treat it.

*Wednesday,*  
*June 8.*

**APPEAL** from the *Switzerland* Circuit Court.

**WORDEN, J.**—Complaint by the appellant against the appellees for unlawfully taking and detaining fifty tons of hay, the property of the plaintiff.

The property was taken by the coronor (to whom the writ was directed), and delivered to the plaintiff, on his giving an undertaking, as required by law.

Answers, in denial, and by *Howard*, that the property



was in one *William Wilson*, and by *White*, that the property was in himself.

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Trial by a jury, who returned the following verdict, viz.:  
“We the jury, find for the defendants.”

TARDY  
v.  
HOWARD.

The plaintiff moved to set aside the verdict for the reason, amongst others, that it did not find the value of the hay, or to whom it belonged; but the motion was overruled, and judgment was rendered for the defendants for costs, and for a return of the hay. The plaintiff excepted.

The verdict is a general one, embracing all the issues, and in that view it finds the property to be in *White*, and also in *Wilson*. Thus it is repugnant and inconsistent with itself. Such a verdict has been held bad in *Ohio. Hewson v. Saffin*, 7 Ham. 223. The Court, in that case, in quoting the language of Judge STORY, in *Barrett v. Stearns*, 1 Mas. 447, say: “If there be a material repugnancy in the verdict, it is not competent for the Court to decide which is the truth of the case; and if it were otherwise, there is no authority to substitute its own opinion for that of the jury. In such case, the repugnancy will be fatal.”

The evidence not being before us, we are not advised on what ground the jury found for the defendants; whether because the property was *White's* or *Wilson's*, or because the defendants had not taken or detained it.

But passing over the repugnancy of the verdict, we are of opinion that it does not authorize a judgment for a return of the property.

The statute provides that where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or its value, where a return cannot be had. 2 R. S. p. 122. It also provides that the jury must assess the value of the property, whenever by their verdict there will be judgment for a return. *Id.* p. 115, § 339.

If the verdict be taken to have determined the title to be in *White* or *Wilson*, or both, so as to authorize a judgment of return, the plaintiff was entitled to have the same jury determine its value, so as to furnish the measure of dam-



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v.  
PARAMORE.

ages in case it could not be returned. Here is omitted a positive requirement of the statute; and without a compliance with this requirement we think no return can be awarded.

If the verdict, as it stands, cannot have the effect of authorizing a judgment for a return of the property, it amounts to nothing more than a finding for the defendants on their denial of having taken it, and in that view, the objection on the score of repugnancy is obviated. In that view, we think the verdict may stand, if the defendants see proper to treat it merely as passing upon the question of taking and detaining the property. [But see *Chissom v. Lamcool*, 9 Ind. R. 530.]

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for further proceedings, with leave to the defendants to take judgment on the verdict against the plaintiff for costs in the Circuit Court, or, at their option, to move to set aside the verdict for not assessing the value of the property so as to enable them to take judgment for a return.

S. Carter, for the appellant.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.  
PARAMORE.

Wednesday,  
June 8.

APPEAL from the *Decatur* Court of Common Pleas.

*Per Curiam*.—Action by the appellee against the appellants to recover damage for the killing of a steer by the engine and cars of the appellants upon their road where it was not fenced.

The action was brought before a justice of the peace, where a demurrer was filed to the complaint. On appeal to the Common Pleas, the cause was tried by the Court without any express notice being taken of the demurrer, and there was a finding and judgment for the plaintiff be-



low. It is insisted that error has intervened in the trial of the cause without disposing of the demurrer. We think from the whole record, the demurrer may be considered as having been overruled.

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GARRETT  
v.  
GARRETT.

The facts in the case are substantially the same as in the case of the same appellants v. *Townsend*, 10 Ind. R. 38, and involve the same question as is therein decided, and adhering to the decision therein, the judgment must be affirmed.

The judgment is affirmed with 5 per cent. damages and costs.

*J. S. Scobey* and *W. Cumbach*, for the appellants.

*J. Garin* and *O. B. Hord*, for the appellee.

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GARRETT v. GARRETT.

APPEAL from the *Wabash* Circuit Court.

Wednesday,  
June 8.

*Per Curiam*.—Suit for divorce. Divorce granted.

It appears that the complaint was filed on the 28th of *October*, 1857. The defendant was a resident of *New York* city, and was notified by publication, and the service of notice personally upon her in said city. On the 25th day of *February*, she appeared by attorney, who, upon his own affidavit, and a sworn statement of the defendant, applied for a continuance. The continuance was refused. On the 1st day of *March*, the defendant answered. On the 2d day of *March*, she renewed the application for a continuance, upon a new affidavit by herself. The Court refused to grant it.

The cause was tried by a jury, who found the charges in the complaint sustained, and the Court granted a divorce.

We cannot say that the Court erred in refusing the continuance. It would be a dangerous practice to permit an application for a continuance to be repeated upon a new affidavit upon the same state of facts.



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GORDON  
v.  
GEORGE.

It is complained that the Court refused to instruct the jury that the charge in the answer against the plaintiff of having committed adultery with one Mrs. *Sexton*, not being denied by reply, was admitted. It is sufficient, on this point, to say that the answer does not contain such a charge. It simply alleges that the plaintiff was lying on a sofa at the house of Mrs. *Sexton*, his niece, and that Mrs. *Sexton* was in the room, the two being the only persons present, &c., but it is not pretended that any act of adultery is charged, further than the defendant infers that one might have been committed. This state of facts would not justify an instruction to the jury that an act of adultery was charged and admitted. It might not be inferred, as a necessary sequence, by every person, that because an uncle had been seen alone in the parlor (for that is the room named), with his niece, at her own house, that an act of adultery had been committed between them.

The judgment is affirmed with costs.

*C. S. Parrish*, for the appellant.

*W. Z. Stuart*, *J. U. Pettit*, and *C. Cowgill*, for the appellee.

#### GORDON v. GEORGE.

Where one person takes a lease of lands of another, and thereby becomes bound to perform certain stipulations, and afterwards assigns the lease before entry, his assignee becomes liable to the performance of such stipulations. Such liability arises not from priority of contract between the lessor and assignee, but from priority of estate.

Where a counter-claim is pleaded, the jury may find for the defendant any excess over the amount proven by the plaintiff.

Thursday,  
June 9.

APPEAL from the *Madison* Court of Common Pleas.

HANNA, J.—*Sarah George*, the appellee, gave a written lease to one *Black*, stipulating therein that *Black* should have the use of a parcel of land for five years; in consid-



eration of which *Black* was to clear the land and make it ready for the plow, and leave the premises in good repair. It was further agreed that *Black* should build a cabin and smoke-house, and dig a well on the premises, for which *Sarah George* was to pay 25 dollars, 37 cents. Before clearing the land or building the cabin, &c., *Black* assigned the lease, by indorsement, to the said *James Gordon*, appellant.

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GORDON  
v.  
GEORGE.

*Gordon* sued before a justice, alleging that he had built the house and smoke-house and dug the well; that the time had expired, and the lessor refused to pay for said house, &c.

The plaintiff recovered a judgment before the justice for 42 dollars. On appeal to the Common Pleas, the defendant had a verdict and judgment for 12 dollars.

The defendant, among other things, set up, by way of counter-claim, that the plaintiff had not cleared the ground according to the contract, &c.

The plaintiff asked the Court to instruct the jury that, "If the jury find the matters of counter-claim of the defendant exceed the amount which the jury may find due the plaintiff, the jury cannot find against the plaintiff such excess," which was refused. Upon this ruling of the Court, the only point made, by brief of counsel, is predicated.

By the statute (2 R. S. p. 120), a plaintiff may dismiss his action; but by § 365, "In any case, where a set-off or counter-claim has been presented, which, in another action, would entitle the defendant to a judgment against the plaintiff, the defendant shall have the right of proceeding to the trial of his claim, without notice, although the plaintiff may have dismissed his action, or failed to appear."

So, in *Vassear v. Livingston*, 3 Kern. 252, it is said that, "A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant."

In *Howland v. Coffin*, 9 Pick. 52, it was held by the Supreme Court of *Massachusetts*, "that the assignee of the lessee is liable to the assignee of the lessor in an action of



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SCOTT

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debt for the time he holds; for though there is no priority of contract, there is a priority of estate which creates a debt for the rent." See authorities cited.

In another case between the same parties, it is said, (12 Pick. 125), "The defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of the rent ran with the land, and by the assignment of the term became binding on the defendant." See *Farmers' Bank v. The Mutual Ins. Co.*, 4 Leigh (Va.) 69; *Taylor's Landlord and Tenant*, 76; *Provost v. Calder*, 2 Wend. 517; 23 *id.* 506; 21 *id.* 32; *Vernon v. Smith*, 5 Barn. and Adol. 11.

It resolves itself into the question, then, under the above, and § 59, p. 41, of the same statute, and the authorities cited, whether the plaintiff was liable to the defendant for the non-performance of the contract of his assignor. We think, under the circumstances of this case, he was. He became the assignor of the whole interest of *Black*, before any part of the contract was performed. By receiving an assignment of the lease, and taking possession of the land under it, he surely became liable to perform the stipulations of that lease, so far as they had reference to improvements upon said land, if no others, of which we do not decide, as it is not necessary to do so.

The ruling of the Court upon the instruction was correct.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*J. Davis*, for the appellant.

*R. Lake*, for the appellee.

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SCOTT v. CRAWFORD.

A complaint upon a promissory note executed for the purchase-money of real property, and praying for the enforcement of the vendor's lien against the



same, is sufficient under the code, without an averment that a judgment had been obtained upon the note in the ordinary form, execution issued thereon, and a return of "no personal property found," &c., or any equivalent averment.

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SCOTT  
v.  
CRAWFORD.

In an action brought to enforce a vendor's lien upon a note given for the purchase-money of real property, a judgment directing the sale thereof, in the first instance, is erroneous, unless it appear from the record that the defendant had no personal property subject to execution out of which the judgment might be satisfied.

APPEAL from the *Miami* Court of Common Pleas.

Thursday,  
June 9.

HANNA, J.—A complaint was filed, in the usual form, upon a note. An answer was filed by one of the defendants, averring that neither of the defendants was a resident of *Miami* county at the commencement of the suit. On motion of the plaintiff, he thereupon had leave to amend his complaint, which he did by alleging that the note was given for part of the purchase-money of certain real estate in said county, and asking a judgment, and averring and praying the enforcement of his lien as vendor.

The defendant, *Nathan Crawford*, demurred to the complaint, which demurrer was overruled.

It is insisted that the complaint was defective in not stating that a judgment had been obtained, in the ordinary form, on the note, execution issued, and a return of no personal property found, &c., or some equivalent averment, of the want of personal property to satisfy the debt.

Whatever may have been the correct practice formerly, when the proceedings at law and in equity were separate, we think that now, under our present system of procedure, no such averment is necessary, although it would tend to simplify proceedings to make such averment where it could be done. There is no distinction made in the manner of proceeding to recover either legal or equitable rights. The modes of proceeding which were formerly distinct, are now blended into one, but, so far as the pleadings are concerned, partake more of the old chancery practice than that of legal forms; and upon the trial and mode of producing evidence, the manner of proceeding at law is, to a great extent, preserved.



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SCOTT  
v.  
CRAWFORD.

The demurrer was properly overruled.

The defendant filed an answer of twenty paragraphs.

Upon motion of the plaintiff, fourteen of the paragraphs were rejected and stricken out. The paragraphs thus stricken out, are not embodied in a bill of exceptions, and properly made a part of the record, so as to enable us to examine them. *Chrisman v. Melne*, 6 Ind. R. 488.

Two of the remaining paragraphs were withdrawn. Issue was taken upon the others; trial by the Court; finding for plaintiff for the amount due on the note, and that it was a lien upon the lot described. Motion for new trial overruled. Judgment on the finding, and "that said real estate, &c., or so much as may be necessary to pay, &c., be sold by the sheriff of *Miami* county for that purpose, without relief, &c.; and that any balance that may remain unsatisfied, after the sale of said lot, be levied of any property of said defendant, *Nathan Crawford*, subject to execution."

It is insisted that this judgment is wrong, because it directs the sale of the land in the first instance. This objection, we think, is well taken, under the pleadings in this case. If the complaint had alleged a want of other property to satisfy the claim, &c., and the answer had admitted, or the proof sustained, that averment, the form of the judgment might then have been right. In the absence of such averment in the complaint, there was no issue of that character to try; and the judgment should have been for the amount of the debt established, with the proper entry that it was a portion of the purchase-money for, &c., and that said land was subject to execution to satisfy the same in the event that other property of the defendant, subject to execution, could not be found, &c. The execution, and proceedings thereon, would have then been in the usual form. If other property of the defendant, subject to such execution, was not found by the officer, it would be his duty to levy upon said land, under the judgment of the Court in the premises.

*Per Curiam*.—The judgment for the amount of the debt, &c., and that it is a lien on the land named, is affirmed;



but so far as it directs execution, in the first instance, to be levied upon said land, it is reversed at the cost of the appellee.

*H. J. Shirk and J. Cavin*, for the appellant.

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1859.

TURNER  
v.  
SIMPSON.

TURNER and Another v. SIMPSON.

Where the parties in an action on appeal from a justice's Court, agreed that several causes might be tried together in the Circuit Court, and one general verdict might be rendered, with a stipulation that if the amount recovered was less, by 25 dollars, than the sum of the recoveries before the justice, the plaintiff was to pay costs in the Circuit Court:—*Held*, that an exception to the overruling of a motion to consolidate the actions, was waived.

12 413  
137 304

If in a suit upon a promissory note in which one of the defendants is principal and another surety, the defendants set up as a set-off an indebtedness of the plaintiff to the principal, the plaintiff may, in order to meet the set-off, set up in reply any indebtedness from the principal to himself, or to any former holder of the note, which is a legitimate subject of set-off; and the excess only of the defendant's claim shall go in bar of the action.

In determining whether a recovery on appeal from a judgment of a justice of the peace is reduced five dollars or not, the sums recovered are the guide, without regard to interest upon the justice's judgment, or upon the claim sued on.

In actions commenced before a justice of the peace, no reply is necessary. Hence, if, upon appeal to the Circuit Court, the plaintiff file a reply which leaves a part of the answer neither denied nor avoided, the defendant will not, therefore, be entitled to judgment on the pleadings.

APPEAL from the *Randolph* Circuit Court.

Thursday,  
June 9.

WORDEN, J.—*Simpson* brought five several actions before a justice of the peace against *John R.* and *William Turner*, each on a promissory note for 80 dollars. The defendants set up that *William* was surety, only, for *John R.*, and, as an offset, alleged an indebtedness from *Simpson* to said *John R.* The plaintiff recovered judgment in each of the causes before the justice, and the defendants appealed to the Circuit Court.

It appears by a bill of exceptions, that in the Circuit Court the defendants moved to consolidate the actions, which motion was overruled, and the defendants excepted.



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TURNER  
v.  
SIMPSON.

If there was any error in this ruling of the Court, we think it was waived by the subsequent agreement of the parties, by which the causes were all tried together, upon which one general verdict was to be rendered, with a stipulation that if the amount recovered was less, by 25 dollars, than the sum of the recoveries before the justice, the plaintiff was to pay costs in the Circuit Court. This was a virtual consolidation of the actions, and so far as we can perceive, gave the defendants all the advantage to which they would have been entitled, had the Court made a formal order consolidating the actions.

The record shows that the defendants moved the Court to tax the costs in all the cases but one, to the plaintiff, which motion was overruled. It is insisted that this was wrong, and that § 401, 2 R. S. p. 127, requires such order to be made. Without stopping to inquire whether the provision of the statute indicated has any application to causes originating before a justice of the peace, we may observe that the ruling of the Court in this particular, is not excepted to, and therefore we cannot notice it.

After the causes came into the Circuit Court, the plaintiff asked and obtained leave to file replications to the offset filed by the defendants, and thereupon he filed an account of an indebtedness from said *John R. Turner* to himself, by way of replication to the answer of defendants, setting up an indebtedness from the plaintiff to said *John R.*

These replications the defendants moved to reject, but the motion was overruled and exception was taken. We are not informed by the record on what ground the motion was made, or that any reason for such rejection was pointed out to the Court.

We think the subject-matter of the replications was available to the plaintiff in bar, so far as it went, of the defendants' offset.

The statute provides that, "In all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant and against



the plaintiff, &c., may be pleaded as a set-off by the principal or any other defendant." 2 R. S. p. 40.

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The defendants were availing themselves of this statutory provision. *John R. Turner* was the principal in the notes. The defendants set up as an offset, an indebtedness from the plaintiff to *John R.*; and, we think, clearly, the plaintiff had a right, in order to meet that offset, to show an indebtedness from *John R.* to himself. Suppose there were mutual, unadjusted accounts between the holder of a note and the principal therein, to a large amount, and nearly equally balanced, it would be the extreme of injustice to permit the account of the principal against the holder of the note to be set up as an offset to it, without taking into consideration his account against the principal. In this manner a party might be wholly deprived of any benefit of having a surety upon his note, although upon an adjustment of the accounts between the parties there be nothing due from him to the principal, but the note wholly due to the holder.

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TURNER  
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SIMPSON.

We are of opinion that the statute in question should be so construed as to permit the claim of the principal in the note to be set up as an offset, subject, however, to any claim of the plaintiff (or any former holder of the note, as the case may be), against the principal, that is a legitimate subject of set-off; and that the excess only should go in bar of the action.

We see no error in the ruling of the Court in this particular.

The cause was tried by a jury, who found a verdict for the plaintiff for 424 dollars, 12 cents, on which judgment was rendered over a motion for a new trial; but the evidence is not set out, nor are any of the reasons assigned for a new trial shown to have existed, except the refusal of the Court to set aside the replications. This reason for a new trial is disposed of by what we have said already.

On the motion for a new trial being overruled, the defendants moved to tax the costs in the Circuit Court to the plaintiff, "upon the ground that, deducting the interest that had accrued on the claims, from the rendition of the



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justice's judgments up to the time of the rendition of judgment in the Circuit Court, the finding is reduced more than 5 dollars on each case."

The motion was overruled, and judgment for costs rendered for the plaintiff.

The sum of the judgments before the justice was 422 dollars, 44 cents, so that the amount recovered is increased rather than reduced. The defendants appealed to the Circuit Court. The statute provides that "if either party against whom judgment has been rendered, appeal and reduce the judgment against him 5 dollars or more, he shall recover his costs," &c. 2 R. S. p. 464, § 70.

We think, in determining the question of reduction, we must take the sums recovered for our guide, without any reference to interest on the justice's judgment, or on the claim sued on. If the legislature had intended that any interest should be taken into the account, they probably would have said so, or have used language conveying the idea. No reasonable latitude of interpretation will authorize us to take the sum recovered before the justice, and the interest thereon up to the time of rendering judgment in the Circuit Court, as the sum to be reduced, when the legislature have prescribed that it shall be the sum recovered before the justice.

In our opinion, the judgment of the Court was right, both under the law and the agreement of the parties.

One other objection is made to the proceedings, which is that, as the plaintiff obtained leave to reply in the Circuit Court, and did file a replication, setting up the matter before mentioned in bar of the defendants' offset, leaving a part of the defendants' answer neither denied nor avoided, the defendants would be entitled to judgment on the pleadings. But as the causes originated before a justice of the peace, where no replications are necessary, but where any matter that might have been replied to any plea might be proved with the same effect as if replied; we think any general replication, either denying or confessing and avoiding the answer, was unnecessary; and that the putting in of the replication mentioned did not



so far change this rule as to make any further replication necessary, although a part of the answer may not have been replied to.

We find no error in the record that should reverse the judgment.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*E. Dumont* and *O. B. Torbet*, for the appellants.

*T. M. Browne* and *W. A. Peelle*, for the appellee.

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BROKER  
V.  
THE CITY  
OF NEW AL-  
BANY.

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BROKER v. THE CITY OF NEW ALBANY.

*A.* made a contract with the authorities of the city of *New Albany*, to grade, pave, &c., part of one of the streets thereof, under the statute for the incorporation of cities, 1 R. S. p. 217; and *B.* became surety for the performance of the contract. *A.* received from *C.*, one of the property owners along the line of street to be graded, &c., in advance of estimates, the full amount for which he would have been liable upon the completion of the improvement, and died, leaving it still incomplete. *B.*, his surety, completed the work upon the contract, to save himself from liability thereon, and then brought suit against *C.*, in the name of the city, to recover the value of such work. *Held*, that he could not recover, because the payment to *A.* was, under the circumstances, a satisfaction of the demand.

APPEAL from the *Floyd* Circuit Court.

Thursday,  
June 9.

HANNA, J.—Under certain provisions of the statute for the incorporation of cities (1 R. S. p. 217), one *Armstrong* and the appellee entered into a contract by which said *Armstrong* agreed to grade, pave, &c., a part of a street for a price agreed upon. One *Saunders* became the surety of said *Armstrong* for the performance of the contract.

Before the completion of the contract, *Armstrong* died. *Saunders*, his surety, completed it.

By the statute referred to, the city authorities make contracts for such improvements upon the petition, &c., of the property holders along the line of the improvement; but it is enacted that "the owners of the lots bordering on such



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street or alley, or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in proportion to the length of the line of the lots bordering thereon, and owned by them."

The 64th section of the act is as follows: "When any such contracts shall be made, and shall be in progress of fulfillment, the mayor and council shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to require such amount to be paid to him, deducting a reasonable percentage to secure the completion of the contract, until the whole shall be finished, by the owners of the lots bordering on the street or alley, or the part thereof to be improved, in the proportion specified in the next preceding section."

The next following section gives power to the city authorities, at the request of the contractor, to bring suit in the name of the corporation, against any one who may refuse to pay his proportion, &c.

The case at bar was decided upon an agreed statement of facts, by which it appears, among other things, that "The whole amount which should have been assessed against the defendant for his proportion of the expense of said improvements upon the final completion of the work, according to the terms of the contract, is 226 dollars, 89 cents, which includes the work done by *Saunders* after *Armstrong's* death. This whole amount was paid by the defendant to *Armstrong*, during his lifetime, for estimates made, and in advance of estimates to be afterwards made. These payments were made at the solicitation and request of *Armstrong*, and to enable him the more advantageously to perform the work required by his said contract, and they were received and accepted by him as a full payment of all the defendant's portion of the expense of said improvements."

The Court found for the plaintiff 73 dollars, 50 cents, and gave judgment therefor.

It is insisted that this judgment is right, because all payments made by the defendant to the contractor, over the



estimates from time to time made, were so made at his risk; and if, for any reason, the contractor should fail to complete his undertaking, the property holder would be liable for such sums as might be necessary to complete the work, in the same manner as if no payments had been made beyond the estimates.

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When closely examined, it will be seen that the facts in the case at bar do not bring it within the general proposition thus advanced to sustain the judgment. It is not necessary, therefore, to examine or decide whether the defendant would, by the payments he thus made to *Armstrong*, have been discharged from all liability, for the completion of that improvement, if the work had, after the death of *Armstrong*, been completed by some other person under a new contract.

Here there is no pretense that a new contract was made; but it is expressly agreed that *Saunders* completed the contract of *Armstrong* to avoid liability as a surety for the failure of his principal.

Any payments made to *Armstrong* would have been good as against any suit brought by him, or for his use, in his lifetime, for the work, even if made in advance of estimates. Why not good as against a suit brought after his death, and after work done under the circumstances herein?

It is argued that *Saunders* had certain rights as surety, one of which was, the privilege of completing the work under the contract of *Armstrong*, to save himself harmless, at the same rates of compensation which his principal was to receive.

It is not necessary for us to decide whether *Saunders* had the right here contended for, to complete the work, on the same contract, &c. It is only necessary for us to determine whether, under the circumstances of this case, a payment to *Armstrong* was good against *Saunders*. We think it was. The statute makes the owner of property liable to the contractor. The whole amount for which the defendant was liable for that improvement, if completed according to the existing contract, was, upon the request



May Term, of the contractor, paid to him and received as a full payment.  
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McCONNAHA. But it is said that *Saunders* should be permitted to recover, and leave the defendant to recover from the heirs or estate of *Armstrong*, for the advanced payments made by him.

If the defendant had no right to make payments to *Armstrong* beyond the estimates made, then this position would be plausible; but if he had such right, then, we think that if either the surety or the defendant must suffer, in the first instance, it should be the surety, for the reason that, by the act of becoming the surety of *Armstrong*, he gave him credit, and placed him in a position which enabled him to thus legally receive the money to which he would have ultimately been entitled, if he had completed his contract.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*T. L. Smith*, for the appellant.

*J. S. Stotsenburg*, for the appellee.

### BEESON and Another v. McCONNAHA.

An answer setting up new matter which is untrue, and intended merely to delay the trial, will be deemed a sham defense, though, in point of law, good on its face.

Where a defendant, by answers to interrogatories under oath, concedes his answer to be false, the Court will strike it out, on motion, as a sham defense, though good on its face.

Thursday,  
June 9.

APPEAL from the *Wayne* Circuit Court.

DAVISON, J.—The appellee, who was the plaintiff, brought this action against *William Beeson* and *William S. T. Morton*, upon a bill of exchange. The bill was drawn by *Beeson* upon himself, and accepted by himself, and indorsed by *Morton*.



The defendants answered—

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v.  
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1. "That *Beeson*, on the 16th of *December*, 1856, purchased of plaintiff ninety-five head of hogs, which, by the contract of sale, were to average two hundred pounds each, for which he was to give 5 dollars per hundred weight, and to execute to plaintiff his note for the purchase-money, with *Morton* as surety, payable on the first of *March*, 1857. And they say, that in pursuance of the contract, he, *Beeson*, on the 16th of *December*, 1856, executed the note in suit for the purchase-money of the hogs, calculating the value thereof at the rate of 5 dollars per hundred weight; and they say that *Morton* is merely surety for *Beeson* on the note, and that there was no consideration whatever moving between *Morton* and other parties to said note, which was executed especially, and for no other purpose, to be delivered to the plaintiff for the purchase-money of the hogs. And they further say, that when the hogs were delivered, it was ascertained that they did not average in weight two hundred pounds each, but that the average weight of said hogs so delivered did not exceed one hundred and eighty pounds each; and they say that by reason of the diminished average aforesaid, said hogs were not worth so much to the defendants by — cents on the hundred weight, making, on the total weight of said hogs, the sum of 115 dollars, which sum the defendants set up as a counter-claim in this cause."

2. "That the defendants paid the note in full, before the commencement of the suit."

To these defenses, the plaintiff replied by a general traverse, and thereupon propounded to the defendants the following interrogatories:

1. Were not the hogs mentioned in your answer weighed and delivered before the execution of the bill mentioned in the complaint?

2. Are the facts contained in the first paragraph of your answer true?

3. Have you, or either of you, paid the bill of exchange sued on, or any part of it?

To the interrogatories thus propounded, the defendants



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severally answered to the effect that the hogs were weighed and delivered to *Beeson* before the execution of the bill of exchange, and that said bill remains wholly unpaid.

Upon the filing of these answers, the plaintiff moved to reject the answer to the complaint, on the ground that the same, and each paragraph thereof, was wholly false, and put in by the defendants as sham defenses for the purpose of delay, &c., all which appears by the defendants' admissions as contained in their several answers to the interrogatories, &c. The Court sustained the motion, set aside the answer to the complaint, and rendered final judgment for the plaintiff.

Was the motion to reject correctly sustained? This is the only question raised in the argument of the cause.

It is enacted that "All frivolous demurrers and motions shall be overruled, all sham defenses shall be rejected, and all irrelevant matter shall be set aside," &c. 2 R. S. p. 44, § 77. What is a sham defense? In *New York*, under an enactment similar to the one just recited, it has been decided that an answer setting up new matter which is untrue, and intended merely to delay the trial, will be deemed a sham defense, though, in point of law, it is good on its face. *Van Santv. Pl. 594, 597*, and cases there cited. This exposition seems to be correct. But the inquiry still arises, How is the falsity of the defense to be pointed out to the Court? *Walpole v. Cooper*, 7 Blackf. 100, decides that "A plea apparently good on its face cannot be set aside upon an affidavit made by the plaintiff that the plea is false." See, also, *Brown v. Lewis*, 10 Ind. R. 232. But these decisions do not apply to this case; because here, the defendants themselves, under the sanction of an oath, admit their answer to be untrue.

Thus the falsehood of the answer, in this instance, is conceded; and there are authorities decisive of the point, that where a party concedes his plea to be false, whether it be good on its face or not, the Court will, on motion, strike it out. *Seward v. Hotchkiss*, 2 Cow. 634.—*Broome County Bank v. Lewis*, 18 Wend. 565.—1 Barn. and Cress. 286. When such concession is made, it is said to be "the



well settled practice to strike out the plea; for in such case, it is clear no injustice can be done." Indeed, it is plainly the duty of the Court, whenever sufficiently informed that a defense is false, and intended to delay a cause, to reject it; and it must be conceded that the proofs, in this case, are decisive as to the falsity of the defense, and fully sustain the action of the Court.

The motion to reject was correctly sustained.

*Per Curiam.*—The judgment is affirmed with 8 per cent. damages and costs.

*O. P. Morton* and *J. F. Kibbey*, for the appellants.

*C. H. Burchenal*, for the appellee.

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DOYLE  
v.  
WATT.

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GRAY and Others v. MORRISON and Another.

APPEAL from the *Dearborn* Court of Common Pleas. *Thursday, June 9.*

*Per Curiam.*—The judgment in this case is reversed upon the authority of *Williamson v. Ash*, 7 Ind. R. 495, the facts of the two cases being substantially alike, and involving the same legal principle. Ind. Dig., p. 404, §§ 26, 27.

The judgment is reversed with costs. Cause remanded with instructions to be governed in the decision by the case above cited.

*T. Gazlay*, for the appellants.

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DOYLE and Another v. WATT.

APPEAL from the *Grant* Court of Common Pleas. *Thursday, June 9.*

*Per Curiam.*—The judgment in this case is affirmed, for the reason given in *Doyle v. Watt*, at the present term (1),



May Term, 1859. the questions arising in the record of each case being similar.

THE STATE  
v.  
HART. The judgment is affirmed with 5 per cent. damages and costs.

*A. W. Sanford, J. H. Jones, A. Steele, and H. D. Thompson*, for the appellants.

*J. W. Sansberry*, for the appellee.

(1) *Ante*, 342.

THE STATE on the relation of *FRISBIE v. HART* and Others.

Thursday,  
June 9.

APPEAL from the *Spencer* Circuit Court.

*Per Curiam*.—This was an action against a constable and his sureties on his official bond: The bond is conditioned in the usual form for the discharge of the duties of the constable.

In the complaint it is averred that the relator, on the 7th of *August*, 1840, recovered a judgment before *Robert Stewart*, a justice of the peace, against one *Telford Abshire*, for 92 dollars and costs, &c.; upon which one *Jackson Abshire*, on the 14th of the same month, became bail for the stay of execution; and that on the 13th of *June*, 1856, an execution was issued on said judgment, which reads thus:

“State of *Indiana*, *Spencer* county, ss.: To any constable of *Ohio* township, greeting: Whereas *Alpha Frisbie* recovered a judgment against *Telford Abshire*, before me, *Robert Stewart*, a justice of the peace, &c., for 92 dollars, with interest, &c., together with costs, &c., and said judgment was replevied on the 14th of *August*, 1840, you are hereby commanded that of the goods and chattels of the said *Telford Abshire* and *Jackson Abshire* in your county, you cause to be made the debt, interest, and costs, &c., by



distress and sale thereof, returning the overplus, if any, &c. May Term,  
1859.  
 Given under my hand and seal this 13th of *June*, 1856.  
 [Signed] *Robert Stewart* [seal], justice of the peace." THE STATE  
V.  
HART.

There are seven breaches, the effect of which are, that the constable failed to levy the execution, there being property to be found, &c., and that he failed to make return on the proper return day, &c.

The Court tried the issues, and found for the defendants. New trial refused and judgment.

The record shows that during the trial the plaintiff offered in evidence the above execution; but his offer was overruled, and he excepted.

The execution thus offered should have been admitted, because it is set out in the complaint and constitutes an essential part of that pleading; and its sufficiency could only be questioned by demurrer. 2 R. S. p. 39, § 54. The writ is legal on its face, and, being part of the complaint, the reason why it was refused as evidence is not perceivable. The record does not profess to contain the evidence, and for aught that appears, the officer was bound to execute the writ in good faith and make due return thereon; but whether he was or was not thus bound, the relator had a right, in the first instance, to give it in evidence in support of his action.

The appellee having furnished no brief, we are not informed as to the ground upon which the evidence was rejected.

In view of the case as it stands before us, we think it should have been admitted.

The judgment is reversed with costs. Cause remanded, &c.

*H. G. Barkwell*, for the appellant.



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1859.

NORTON  
v.  
JEWETT.

Thursday,  
June 9.

BREESE and Another v. ALLEN.

APPEAL from the *Miami* Court of Common Pleas.  
*Per Curiam*.—Suit upon a note; judgment below for the plaintiff.

The judgment cannot be reversed.

An appearance without objection, waives a previous discontinuance of a cause. Ind. Dig. 126.

After a cause has been dismissed with permission of the Court, and final judgment of dismissal rendered, the cause is no longer pending in Court, though the judgment for costs, rendered upon the dismissal, has not been paid.

An *amicus curiæ* cannot take an exception to the ruling of the Court. *Campbell v. Swasey*, at this term (1).

The judgment is affirmed with 10 per cent. damages and costs.

• *N. O. Ross* and *R. P. Effinger*, for the appellants.  
*L. Barbour* and *J. D. Howland*, for the appellee.

(1) *Ante*, 70. And see, also, *Hust v. Conn*, *ante*, 257.

NORTON v. JEWETT.

Thursday,  
June 9.

APPEAL from the *Laporte* Court of Common Pleas.  
*Per Curiam*.—This case is affirmed upon the authority of *Davis v. McAlpine*, 10 Ind. R. 137. The cases are substantially alike.

The judgment is affirmed with 1 per cent. damages and costs.

*J. Bradley* and *D. J. Woodward*, for the appellant.

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CRAWFORD v. VERRY.

May Term,  
1859.DEPUTY  
V.  
CLARK.APPEAL from the *Jefferson* Circuit Court.

*Per Curiam*.—The point in this case is simply this: *Crawford* married a wife. There was a debt of record existing against her at marriage, being the consideration of a piece of land in the possession of the wife, and enjoyed by the husband jointly with her. This debt the husband paid by selling to the creditor another piece of land of the wife. The sale was with the consent of the wife, and was evidenced by a written instrument executed by the husband. The wife died before making a deed. Her heirs refuse to execute the deed. The creditor now sues the husband. He recovered. We think he was entitled to his election, either to treat it as a claim against the husband, sue him, and recover it, leaving him to go back upon the estate of the wife descended to the heirs; or to thus resort, himself, to that estate. The husband paid a debt of his wife, contracted *dum sole*, for which he was liable when he paid it, being in the lifetime of the wife. He paid it in a specific article. The title to that article failed. The husband was then liable for its value.

The judgment is affirmed with 1 per cent. damages and costs.

*C. E. Walker*, for the appellant.

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DEPUY v. CLARK.

The pledgee of a promissory note, who settles with the maker and surrenders it, thereby becomes liable to account to the pledgor for the full amount thereof.

If the pledgee of a promissory note, upon settlement, surrender it to the maker, in consideration of a sum of money equal to the debt for which it was pledged, and a reasonable compensation for collecting the same, and another promissory note for the balance, the pledgor may demand either



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such other note, or the full amount of the original pledge, after deducting the sum for which it was pledged, and such reasonable compensation.

If the pledgee of a promissory note settle with the maker and surrender it to him for a sum of money equal to, or greater than, the debt thereby secured, and another promissory note for the balance, the pledgor may maintain suit for the amount of the pledge without first having made a demand.

Thursday,  
June 9.

APPEAL from the *Wabash* Court of Common Pleas.

WORDEN, J.—Action by the appellee against the appellant to recover the amount of a promissory note made by one *Volney L. Williams* to the plaintiff, for the sum of 643 dollars, 48 cents, dated *October 10, 1853*, and payable one day after date, alleged to have been placed in the hands of the defendant by the plaintiff, as collateral security for the payment of an account of 50 dollars, due from the plaintiff to the defendant. Averment that the defendant had received certain property and some money from *Williams*, on the note, and that he had surrendered up the note to *Williams*, taking the note of *Williams* payable to himself for the balance, amounting to 439 dollars, 77 cents. The claim was set out in three several paragraphs of the complaint. There was a demurrer filed to the complaint for misjoinder of causes of action, which was overruled. This decision we cannot revise, if wrong. 2. R. S. p. 38, § 52.

There were demurrers filed to two of the paragraphs of the complaint, but as none of the statutory causes of demurrer were assigned, they were correctly overruled. *The State v. Leach*, 10 Ind. R. 308.—*Lane v. The State*, 7 id. 426.

The defendant answered in several paragraphs, to which replications were filed, and the cause was tried by a jury. Verdict for the plaintiff for 577 dollars, 12 cents, on which judgment was rendered, over a motion for a new trial.

By a bill of exceptions setting out all the evidence, it appears that on the trial the plaintiff proved by a witness that he started west in *November, 1853*; and that soon after he started, the defendant told the witness that he had loaned the plaintiff 60 or 65 dollars, and had taken of him a note on *Williams*, his half-brother, for some 607 dollars, as security; and that he had taken an assignment to the



effect that he was to repay the money, or the *Williams* note was to be his. He said, if *Clark* did not pay him by a certain time, the note was to be his; that he had let *Clark* have the money to go west to see his brother, *Williams*, to get money to redeem his land from a mortgage, and *Clark* did not return for fourteen months.

By said *Volney L. Williams*, he proved that in *May*, 1854, the defendant presented to him, in *Illinois*, the note in question, and that he settled it by giving the defendant a buggy and harness, at 225 dollars, 300 dollars in money, and his note for the balance of 439 dollars, 77 cents, payable in six months, to the defendant. The other note was given up to *Williams*.

*Williams* was solvent at the time, and worth considerably more than would pay all his debts. He did not represent to the defendant that he could not make the money off him by suing, or that he was embarrassed.

This is the substance of the plaintiff's testimony, except some testimony tending to show a demand before suit brought.

During the examination of one of plaintiff's witnesses, the defendant offered to prove by him that the plaintiff had offered to sell the *Williams* note to the witness for the same amount that defendant gave for it, 85 dollars, to which proof plaintiff's counsel objected, on the ground that it formed no part of the agreement between the parties to the suit; and the objection was sustained, and the defendant excepted.

The objection was not based upon the ground that the defendant could not go out of a proper cross-examination for the purpose of establishing facts necessary to sustain his defense, and that, if he wished to prove such facts, he must make the witness his own, and introduce him for that purpose. The objection was simply that the testimony was irrelevant. We cannot say, however, that the ruling was wrong. From all the evidence then before the Court, the testimony did not appear to be relevant. Counsel did not even undertake to afterwards show its relevancy. The ground assumed in the argument is, that if *Clarke* offer-

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CLARK.

ed the note to the witness for 85 dollars, it showed what he thought it to be worth, and the probability of his having offered and sold it to *Depuy* for the same sum. But at that time there was no evidence before the Court on the subject of the purchase of the note by *Depuy*, for the sum of 85 dollars, or otherwise. The offering of a piece of property to one man for a certain sum, would not ordinarily have any tendency to prove a sale of it to another man for the same sum.

If, after the defendant had introduced his proof to establish a sale of the note by the plaintiff to the defendant for 85 dollars, the disparity between the amount paid and the amount of the note, rendered the transaction improbable, or the testimony doubtful, and if the testimony offered became thereby admissible (a question which we do not decide), as showing the value put upon the note by *Clark*, and thus removing the apparent improbability of the transaction, the proof should have been then offered.

It is said, in note 326 to Phillip's Evidence, that "If evidence be irrelevant at the time it is offered, it is not error to reject it because other evidence may afterwards be given, in connection with which it would be relevant. If it would be relevant in connection with other facts, it should be presented in connection with those facts, and an offer to follow the evidence proposed with proof of those facts, at a proper time."

One of the grounds of defense was, that the note was unconditionally sold and transferred by the plaintiff to the defendant.

The defendant proved by a witness, that a few days before *Clark* went west and was so long gone, witness was in defendant's office, when the plaintiff came in and proposed to sell the defendant a note on a man named *Williams* for 600 or 700 dollars; defendant said he did not care about buying it. *Clark* asked 100 dollars for it; defendant said he could not give that. *Clark* was owing defendant a doctor's bill, and defendant proposed to give *Clark* the account against him, and cash, to make, in all, 85 dollars. The account was between 20 and 30 dollars. *Clark* said



he would take it, and the money was paid to him, and the note was transferred to the defendant, and the plaintiff went out. After he had gone out, the defendant called to him and asked him when he was coming home. *Clark* replied "in a month." The defendant then told him, if he would come back in a month, he would let him have the note for the same he had given him for it. This last conversation was after the trade for the note had been made, and after the plaintiff had gone out.

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If the account of the transaction given by the last-mentioned witness, be correct, it is clear that the plaintiff has no ground of action against the defendant. There was a complete sale and transfer of the note for a valuable consideration. According to this statement of the case, the debt which the plaintiff owed defendant for a doctor's bill, was extinguished, and there was no agreement, express or implied, to refund the money paid for a transfer of the note.

➤ Suppose, on this state of facts, the defendant had sued the plaintiff for the doctor's bill and the money advanced, he certainly could not have recovered.

There was no debt to secure which the note could be pledged, as the transfer of the note canceled the previous indebtedness. Nor was the transfer of the note in any manner conditional, but absolute. Even the proposition made by the defendant to the plaintiff, after the trade was completed, that if he would in a month come back, he, the defendant, would let the plaintiff have the note again for what defendant had given him for it, does not appear to have been accepted by the plaintiff. He did not agree to take the note back on the terms proposed. A proposition on one side, not accepted on the other, has not the binding force of a contract.

On the other hand, if the note was placed in the hands of the defendant as a mere pledge or collateral security for the payment of the debt, we are of opinion that the defendant, under the circumstances shown, was liable to the plaintiff for the amount of the note and interest, deducting the amount of the defendant's claim against the plaintiff, and



May Term, his reasonable expenses incurred in collecting the note.  
 1859. By settling the note with *Williams* in the manner he did,  
 DEPUTY and surrendering it up to him, he became bound to the  
 V. plaintiff for the full amount thereof.  
 CLARK.

In Story on Bailments, § 321, it is said that, "Where the pledge is a negotiable security (such as a negotiable note), the pledgee has a right to recover and receive the money due thereon, and to sue for it in his own name. But he has no right (unless, perhaps, in a very extreme case) to compromise with the parties to the security for a less sum than the sum due on the security, and if he does, he will be compelled to account to the pledgor for the full value."

This doctrine is sustained by the case of *Garlick v. James*, 12 Johns. 146, which was like the present in many of its features. The maker of the note pledged, in that case, as in the present, was solvent.

It is claimed that the defendant cannot be liable for the amount of the note given him by *Williams*, which is not yet paid. But we do not see how the fact that that note has not been paid, would lessen his liability. Suppose he had not taken that note at all, but had compromised the note pledged, and given it up to the maker upon receiving the property and money paid him; he would then have been liable, under the authorities, for the full amount. The fact that he has the prospect of getting something more, cannot surely lessen his liability. In the case of *Garlick v. James, supra*, the pledgee had compromised with the maker of the note, and taken about one-half of what was due upon it. It was urged, on the part of the defendant, that the plaintiff might still call upon the maker for the balance due upon the note, as the payment made by him being a less sum than was due, it would not operate as a discharge of the note. But the Court said: "Admitting this to be correct, it will not exonerate the defendant if he has so disposed of the pledge as to make himself responsible. A party may have two remedies for an injury, and may elect which to pursue."

So here, admitting that the plaintiff might be entitled to



the proceeds of the note given by *Williams* to the defendant, he is not bound to pursue that remedy, but may hold the defendant responsible for the whole amount.

At the time of the trial, the *Williams* note amounted, principal and interest, to about 730 dollars. The verdict makes a deduction from this amount of about 153 dollars, for the defendant's claim on the plaintiff, and, as we suppose, for the expenses incurred by the defendant in collecting the *Williams* note. This, under the evidence, seems a fair and reasonable deduction. The damages are not excessive, if the plaintiff can recover at all.

The jury found in accordance with the admissions of the defendant as proved, rather than the testimony offered by the defendant, and we do not feel authorized to disturb their finding. According to those admissions, the note was placed in the hands of the defendant as a mere security for the repayment of the money loaned; and although he at the same time said that if the money was not repaid by a certain time the note was to be his, yet the terms of a conditional sale, if the admissions have a tendency to show such sale, are left vague and uncertain, and the jury having passed upon the whole matter, and having found virtually that the defendant held the note as a mere security, we cannot disturb their verdict.

No point is made as to the variance between the complaint and the evidence, as to the debt for which the note was pledged; but had such point been made, the complaint was amendable below, and would be deemed amended here. *Warbritton v. Cameron*, 10 Ind. R. 302.

A point is made as to the sufficiency of the proof of demand for the note before suit, and that no tender was made of the debt to secure which the note was pledged. We think no such tender or demand was necessary. By converting the note to his own use, the defendant became liable to the plaintiff in a greater sum than that to secure which the note was pledged; and for the sum due him, the plaintiff could sue without making any tender of what was due from him to the defendant. And by converting the note to his own use, the defendant became liable to an ac-

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May Term, 1859. tion without any previous demand. *Spencer v. Morgan*, 5 Ind. R. 146.—*Cox v. Reynolds*, 7 *id.* 257.

WEST v. TOWNSEND. On an examination of the whole case, we find no error which we think should reverse the judgment.

*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*J. U. Pettit*, *C. Cowgill*, and *J. M. Wheeler*, for the appellant.

*J. D. Conner* and *G. E. Cordon*, for the appellee.

### WEST and Others v. TOWNSEND and Others.

The Probate Court, upon application by the administrator, was authorized by the R. S. 1843, pp. 531, 532, §§ 245, 251, to order a sale of the decedent's real estate to discharge liens thereon; and after such sale, the payment of the purchase-money, and the application thereof to the discharge of such liens in the order of their priority until it was exhausted, a junior incumbrancer whose lien was still unpaid, could not enforce it against the real estate so sold, in the hands of the purchaser.

Thursday,  
June 9.

APPEAL from the *Miami* Circuit Court.

PERKINS, J.—This was a suit to obtain execution against real estate of a deceased debtor, upon a judgment rendered in 1847.

Answers were put in, replies filed, and the issues were tried by the Court, who found for the plaintiff, and ordered execution for the sale of the land.

The facts of the case are these:

In the lifetime of *Alexander Wilson*, judgments were obtained against him in the following order, in the *Miami* Circuit Court, viz.: One in favor of *Calvin B. House* for 640 dollars, *February* 23, 1846; one in favor of *Bower and McVane*, for 367 dollars, 95 cents, on the same day; one in favor of *Bancroft*, for 112 dollars, 20 cents, *August* 27, 1846; one in favor of *Thompson M. Coon*, for 432 dollars, 60 cents, *August* 24, 1846; and that of the plaintiffs in



this suit, for 681 dollars, 50 cents, on the 12th of *March*, May Term,  
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In 1849, *Alexander Wilson* died, seized in fee simple of one hundred and sixty acres of land in *Miami* county, *Indiana*. *John M. Wilson* was appointed administrator upon his estate. In due course of administration, it was found that the personal estate was insufficient for the payment of the debts of the deceased, and application was made to the proper Court for the sale of the real estate above mentioned, it being all of which *Alexander Wilson* died seized. The sale was ordered, and took place in 1851, *Amos West* becoming the purchaser. The petition for the sale of the real estate set forth the judgments above described, as constituting the main indebtedness for the discharge of which it was necessary to sell said real estate; no proceedings having been instituted on any of them to subject it to sale. The land brought, at the sale, 1,350 dollars, being more than its appraised value, and all, if not more than it was worth—the consideration was all paid by *West*, the purchaser, and was applied upon the judgments upon the land older than those of these plaintiffs.

On the payment of the purchase-money, *West* received a deed, approved by the Court, under which he has since occupied and substantially improved the land.

The R. S. 1843, under which the sale of the real estate in this case took place, authorized the Probate Court to order the sale, subject to existing liens, of real estate for the payment of debts (p. 531, § 245); and they authorized it to order the sale for the discharge of the liens (p. 532, § 251). And it might, in the order, combine both objects. It did in the case at bar. And where real estate is ordered to be sold to discharge the liens of judgments upon it, the title of the purchaser relates back, as in case of sheriff's sales, to the date of the oldest judgment upon which the sale takes place. Such being the case, the title of *West* to the land purchased by him, is not subject to sale again upon the judgments of these plaintiffs. It is not subject to the lien of their judgment.

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WEST  
v.  
TOWNSEND.



May Term, 1859. *Per Curiam*.—The judgment is reversed with costs.  
Cause remanded to be dismissed.

PATTERSON v. BLAKE. *N. O. Ross and R. P. Effinger*, for the appellants.  
*J. A. Beal*, for the appellees.

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PATTERSON v. BLAKE and Another.

A report of commissioners appointed to make partition of real property, to the effect that the same was not susceptible of division, should not be set aside on the ground that it is false, without legitimate proof of its falsehood.

Real property which constitutes the stock in trade of a partnership that has no outstanding debts or liabilities, may, upon the application of part of the firm, be divided among the partners according to their respective interests therein.

Friday,  
June 10.

APPEAL from the *Marion* Circuit Court.

*Per Curiam*.—The appellees sued *Patterson* in two separate actions, one for the partition of real estate, and the other for a dissolution of partnership, and for an accounting between the partners. These suits were, upon the defendant's motion, consolidated. The complaint for partition alleges that plaintiffs, *Blake* and *Ray*, and defendant, *Patterson*, are the owners in common in fee simple, of certain lands (describing them) and water power connected therewith, of which they, the plaintiffs, demand partition, &c. The complaint for dissolution, and for the accounting, &c., states that plaintiffs and defendant entered into a contract for the purpose of constructing a flouring, grist, and saw-mill, on that part of the steam-mill site near *Indianapolis* which lies west of *Blake* street, near the *National* road bridge; that in the construction of the mill and everything connected therewith, the defendant was to pay one-half the expense, and plaintiffs the other half; and so, also, of the expense of carrying on the various businesses designed and proposed to be carried on by its construction. It



is averred that the parties, in pursuance of the contract, did erect, at said steam-mill site, a flouring, grist, and saw-mill, with the necessary machinery, &c., for doing business; that in doing all of which, the plaintiffs have paid, laid out and expended a much larger amount than defendant, viz., 7,000 dollars more than he, and although they have often called on, and requested him to settle and account, he has wholly failed to do so; that they have been compelled to continue as partners with the defendant, in conducting the milling business, which requires great outlays of money, which they are forced to advance or let the business stand; and that by reason of the defendant's failure to pay and keep even with them in expenditure, they are greatly injured, and are damaged 8,000 dollars.

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An account, showing various items of expenditure alleged to have been made by the plaintiffs, is filed with the complaint.

There is a supplemental complaint, which charges that defendant has taken possession of the mill, and holds it to the exclusion of his partners, and takes all the proceeds, &c.; that he is dishonest and unsafe, and should not be allowed to control the business, &c.; and asks the appointment of a receiver to take possession of the mill and property until partition is made, &c.

Defendant answered—*first*, by special denial; and *secondly*, by alleging, *inter alia*, that the real estate described in the complaint is connected with said mill and partnership property, and that plaintiffs are indebted to defendant 14,000 dollars. An account, consisting of the items of the indebtedness thus alleged, is filed with the answer. There was a reply to the answer. The accounts filed by each party were, by order of the Court, referred to a master commissioner, who having reported thereon, the consolidated causes were submitted to the Court for trial, and the Court, having heard the evidence, &c., and being sufficiently advised, &c., ordered that the plaintiffs were entitled to partition of the lands described, &c., and that *N. B. Palmer, Nathaniel West, and William Sheets*, be appointed commissioners to make such partition, and that they report, &c.



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v.  
BLAKE.

And further, the Court found in favor of the plaintiffs, and against the defendant, 702 dollars, for which judgment was rendered, &c.

After this, in *January*, 1857, the Court being in session, the commissioners appointed to make partition, reported "that neither the whole nor any part of the lands of which partition is demanded, can be divided without damage to the owners." And thereupon the Court ordered that the lands, mills, water privileges, and appurtenances, &c., as described, &c., be sold, &c., and that *Robert B. Duncan* be appointed to make the sale, &c.

The record shows, that upon the filing of the commissioners' report, the defendant moved to set it aside, on the ground that said real estate, except the water power, including the mill-dam and race, is susceptible of partition; but his motion was overruled, and we think correctly, because the correctness of the report, so far as it avers that the lands, &c., are not susceptible of division, &c., stands unassailed by any legitimate proof. But it is insisted that the lands, &c., being partnership property and stock in trade, the Court erred in awarding the partition. The position thus assumed would be tenable, did it appear that there existed outstanding debts against the partnership, or joint liabilities uncanceled; but as the case stands, no such debts or liabilities appear to exist, and consequently there seems to be no valid reason why the action of the Court in ordering the partition, should be held erroneous. *Roberts v. McCarty*, 9 Ind. R. 16, and notes. Other points are raised in the assignment of errors, but not insisted upon in the appellant's brief. They will not, therefore, be noticed in this opinion. See rule 28 of this Court; Ind. Dig., p. 722.

The judgment in favor of the plaintiffs for 702 dollars, is affirmed with 5 per cent. damages, and the order directing the sale of the real estate, is also affirmed, and costs adjudged against the appellant, &c.

*H. O'Neal*, *J. L. Ketcham*, and *I. Coffin*, for the appellant.

*J. Morrison* and *C. A. Ray*, for the appellees.



LOVE and Others v. MIKALS, Administrator.

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1859.

LAWSON  
v.  
NEWCOMB.

APPEAL from the *Bartholomew* Court of Common Pleas.

Friday,  
June 10.

*Per Curiam*.—*Mikals*, as administrator, filed his petition praying for an order to sell certain real estate of his intestate, to pay debts, &c. An order was granted, from which the defendants appeal. The appeal is prematurely taken, and cannot be sustained. The order for the sale is not a "final judgment" from which an appeal lies, under the provisions of § 556, 2 R. S. p. 159. This was settled in the case of *Staley v. Dorset*, 11 Ind. R. 367. That case was like the present, and must govern it.

The appeal is dismissed with costs.

*N. T. Hauser, R. Hill*, and *W. Singleton*, for the appellants.

*W. F. Pidgeon*, for the appellee.

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Case 2  
165 176

LAWSON, Administrator, v. NEWCOMB and Others.

If a defendant to an action in the Circuit Court, die after service of process therein, the action may, under 2 R. S. p. 32, § 21, be prosecuted in that Court to final judgment against his administrator.

APPEAL from the *Floyd* Circuit Court.

Friday,  
June 10.

WORDEN, J.—Action by the appellees against *Verry*, upon a promissory note. After the institution of the suit and the service of process upon *Verry*, his death was suggested, and his administrator was made a party defendant, who appeared and answered, and such proceedings were had, as that final judgment was rendered for the plaintiffs below.

The only point made by counsel for the appellant, is in reference to the jurisdiction of the Circuit Court over the cause, after the death of *Verry*.



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1859.

COLLINS  
v.  
GRANTHAM.

It is provided by the act to establish Courts of Common Pleas, &c. (2 R. S. p. 17, § 4), that "The Court of Common Pleas within and for the county or counties for which it is organized, shall have original and exclusive jurisdiction in \* \* \* all actions against executors and administrators, \* \* \* except where, in special cases, concurrent jurisdiction is given by law, to some other Court."

By the code (2 R. S. p. 32, § 21), it is provided that "no action shall abate by the death, &c., of a party. In case of death, &c., the Court, on motion, &c., may allow the action to be continued by or against his representatives."

If there is any conflict between the two provisions, the latter must prevail, having been passed and approved subsequently to the former.

The Circuit Court had jurisdiction of the action against *Verry*, and when he deceased, we think the plaintiffs had the right to prosecute the cause to final judgment against his administrator in the same Court.

The latter statute gives the Circuit Court, in such case, jurisdiction over the cause as against the administrator.

*Per Curiam*.—The judgment is affirmed with costs.

*W. T. Otto* and *J. S. Davis*, for the appellant.

*T. L. Smith*, for the appellees.

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#### COLLINS v. GRANTHAM.

Entries in a hymn book, proved to be in the handwriting of a parent, or made by direction of a parent, *ante litem motam*, in the form of a family record, are admissible in evidence to prove the age of a child, where the father and mother are dead, and the child has no near relative in the state.

Friday,  
June 10.

APPEAL from the *Shelby* Circuit Court.

WORDEN, J.—Suit by *Grantham* against *Collins*, on a note, dated *January 1, 1842*. *Collins* pleaded infancy. Issue. Trial by the Court; finding and judgment for the plaintiff.



On the trial, the defendant produced an ancient looking book, destitute of covers, and from the title page, appearing to have been published in 1812, and containing the psalms and hymns of *Isaac Watts*, upon a blank leaf of which is written the following, viz.:

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COLLINS  
v.  
GRANTHAM.

*Amos Collins*, born *February*, 31, 1789.

*Priscilla Swing*, born *April* 4, 1797.

*Amos Collins* and *Priscilla Swing*, married *March* 18, A. D. 1819.

*Sarah Jane Collins*, born *December* 31, 1819.

*Stephen Collins*, born *May* 14, 1821.

*Samuel Collins*, born *May* 1, 1823.

*Almira Collins*, born *May* 10, 1825.

And proved by *Edward Gird*, that said entries were in the handwriting of *Amos Collins* (the father of the defendant), who died in 1829. That shortly after the death of *Amos Collins*, *Priscilla Collins*, the mother of the defendant, at the late residence of the deceased, produced to him the said psalm and hymn book, and that at her request, he made on said blank leaf the following entries, viz.:

*Dewitt Collins* was born *July* 15, 1827.

*Amos Collins* was born *December* 18, 1829.

These last entries are in the handwriting of *Gird*, the witness. *Gird* also testified that the defendant has, older than himself, a sister named *Sarah Jane*; and, younger than himself, a brother named *Samuel*, a sister named *Almira*, and brothers named *Dewitt* and *Amos*, born in the order above named; that the mother of the defendant is dead; that his brothers and sisters reside out of this state; and that he has no uncle or other near relative, in the state, known to the witness. The witness, *Gird*, believes the entries named to be the family record of the father of defendant, though he was never so informed, and never saw it except on the occasion above stated.

This was all the evidence on the issue thus formed.

The Court received the book and the entries in it, and the testimony of *Gird*, reserving the question as to their admissibility for final decision. On the final decision, it was considered by the Court that the testimony thus of-



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v.  
**GRANTHAM.**

Mr. *Greenleaf*, after stating the proposition that hearsay evidence, as it is sometimes termed, is admissible in matters of pedigree, says that "The term pedigree embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the time when these events happened. These facts, therefore, may be proved in the manner above mentioned, in all cases where they occur incidentally and in relation to pedigree. Thus, an entry by a deceased parent, or other relative, made in a bible, family missal, or any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child or other relative, is regarded as the declaration of such parent or other relative, in a matter of pedigree." 1 *Greenl. Ev.*, § 104.

In 1 *Phil. Ev.*, p. 250 (ed. 1859), it is laid down that "Not only may relationship in general be proven by the hearsay of a family, but particular facts may also be proved, such as the ages of persons, dates of death or birth. There are several authorities for admitting hearsay as to dates. Thus, upon a question whether a testator, at the time of making his will, was of full age, a written memorandum by a deceased parent, stating the time of his birth, has been admitted to be good evidence. *Herbert v. Tuckal*, T. Raym. 84, is cited. This doctrine is fully recognized in *Roe d. Brune v. Rawlings*, 7 East. 290, where the Court say: "There are several instances in the books, where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death. Thus, a written memorandum of a father, as to the time when his child was born, has been received to prove when the infant would come of age, and that he was in fact under age at the time of making his will."

In *Kidney v. Cockburn*, 2 Russ. and Mylne, 167, Lord BROUGHAM was of opinion, as were Justices PARK and LITLEDALE, to whom the point was submitted, that statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent



evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other.

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V.  
GRANTHAM.

The case of *Higham v. Ridgway*, 10 East. 109, establishes the proposition that the time of birth, and consequently the age of a party, may be proven by hearsay, as well as any other matter of pedigree. There, an entry made by an *accoucheur* (since deceased) in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he made a charge for his attendance, which was marked paid, was held competent evidence as to the time of the child's birth, upon an issue as to his age at the time of his afterwards suffering a recovery. The evidence, in this case, was admitted on the ground that it was the declaration of a party against his interest, the entry alluded to showing that his charges were paid. But the case is, nevertheless, authority for the proposition that the time of a party's birth, and consequently his age, may be shown in a proper case, by testimony usually denominated hearsay.

If the fact sought to be shown in the case at bar, comes within the rule as to the admission of hearsay in matters of pedigree, and we think it does, the evidence appears to be admissible, and sufficient for the purpose for which it was intended. The entries are shown to have been in the handwriting of the father of the defendant, except those which were made subsequent to his death, by the witness, *Gird*, at the request of the mother. These entries show the birth of the father and mother, the date of their marriage, and the birth of their children, in the order in which the testimony of *Gird* shows them to have been born. From all the facts, it sufficiently appears that the paper offered was the family record of the father of the defendant; at all events, it furnished a sufficient declaration of the father as to the ages of his children, to be admissible under the authorities, as evidence. The entries are not obnoxious to the objection that they were made *post litem motam*. On the contrary, they were made long before any controversy arose, and before the note sued on was exe-



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cuted. They were made at a time when there was no apparent motive or inducement to misstate the facts or pervert the truth. The father and mother being both dead, and there being no near relatives of the defendant in the state, we are of opinion that the evidence was competent.

From this evidence, it appears that the defendant was born *May* 14, 1821, and had not reached his majority on the 1st of *January*, 1842, when the note was executed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded for a new trial.

*M. M. Ray* and *T. A. McFarland*, for the appellant.

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SLOAN and Another v. WITTBANK.

*Held*, on the authority of *Carver v. Williams*, 10 Ind. R. 267, that a defendant who has answered and then withdraws his appearance, thereby withdraws his answer also.

*Held*, also, on the authority of *Key v. Robinson*, 8 Ind. R. 368, and *Shaw v. Binkard*, 10 *id.* 227, that the failure to call and default a defendant, who, after having appeared and answered withdraws his appearance, is an irregularity; but such an irregularity as the Court below might amend; and which may be deemed to be amended in the Supreme Court.

Friday,  
June 10.

APPEAL from the *Putnam* Court of Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, sued *Sloan* and *Fordyce* upon a promissory note for the payment of 400 dollars. The note bears date *March* 7, 1857, was payable to the order of *Walters* and *Cummings* at six months, and was by them assigned to the plaintiff.

Demurrer to the complaint overruled. This ruling is assigned for error; but as no exception appears to have been taken to the refusal to sustain the demurrer, the error thus assigned is not properly before us.

Defendants answered in seven paragraphs, to which there were replies. And the cause being thus at issue, the defendants withdrew their appearance, and thereupon the



Court proceeded to the trial of the cause; and the plaintiff having read in evidence the note and indorsement thereon, which was all the evidence given, the Court found for the plaintiff and assessed his damages at 406 dollars, for which judgment was rendered, &c.; whereupon the defendants appeared and moved for a new trial on three grounds—

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WITTBANK.

1. That the judgment is irregular and illegal.
2. That the decision of the Court is contrary to law.
3. The Court erred in hearing the evidence and assessing the damages after defendants had withdrawn their appearance.

This motion was overruled, and the defendants excepted.

In *Carver v. Williams*, 10 Ind. R. 267, it was held that if a party appear and plead, and then fail to appear at the trial, his pleadings stand; but if, after pleading, he withdraw his appearance, his pleadings go with it; that without an appearance, a party cannot answer; nor can he have an answer standing where there is no appearance. This exposition is, no doubt, correct; and when applied to the case at bar, at once shows that the defendants, having withdrawn their appearance, also withdrew their answer. But it is insisted, there being no answer, that the judgment is erroneous, because the plaintiff, instead of proceeding to the trial of the cause upon the evidence, "should have taken a judgment by default or *nil dicit*." It must be conceded, that the action of the Court, as it appears in the transcript before us, was not in accordance with the ordinary rules of procedure; still the record presents a mere irregularity, which could not, in any degree, result in injury to the defendants. And the statutory rule is, that "No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance, or imperfections contained in the record, pleadings, process, entries, or other proceedings therein, which by law might be amended by the Court below; but such defects shall be deemed amended in the Supreme Court," &c. 2 R. S. p. 162, § 580. Here, the record sufficiently shows that the judgment is not in conflict with the substantial rights of the parties, and that the proceedings, so



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far as they show a failure to take a default against the defendants, are imperfect. But in view of the provision just recited, it seems to us that that imperfection might have been amended in the Circuit Court, and, in sequence, may "be deemed to be amended in this Court." *Key v. Robinson*, 8 Ind. R. 368.—*Shaw v. Binkard*, 10 *id.* 227. These authorities are directly in point, and are decisive of the questions arising in this record.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*R. L. Hathaway*, for the appellants.

*F. Rand*, for the appellee.

### THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY v. ROSS.

The statute of 1853 in relation to the liability of railroad companies whose roads are not fenced, for killing stock, does not apply to actions commenced in Courts of Common Pleas, and Circuit Courts; but only to such as are brought in justices' Courts.

The act of 1859 extended the rule established by the act of 1853 for the decision of causes brought in justices' Courts, against railroad companies for killing stock, to actions of the same class brought in Courts of Common Pleas and Circuit Courts.

Friday,  
June 10.

APPEAL from the *Sullivan* Court of Common Pleas.

PERKINS, J.—Suit by *Ross* against *The Evansville and Crawfordsville Railroad Company*, to recover for stock killed upon the railroad by the machinery of the company. The suit was instituted originally in the Common Pleas. The complaint alleged that the road of the company was not fenced, but it did not aver any negligence in the management of the machinery by which the stock was killed.

A demurrer to the complaint, because it did not state facts sufficient to constitute a cause of action, was overruled, and the defendants excepted.



The cause was tried, and the plaintiff recovered.

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The circumstance that the road was not fenced, controlled the decision of the cause, when it should have had nothing to do with it. *The Indianapolis, &c., Co. v. Taffe*, 11 Ind. R. 458.

THE EVANS-  
VILLE, &C.,  
RAILROAD Co.  
v.  
ROSS.

The statute of 1853 in relation to liability of railroad companies for stock killed where the road was not fenced, applied only in cases originally commenced before justices of the peace. *Ibid.* Suits commenced in any other Court were governed by the rules of the common law.

By that law, the complaint in this case contained no cause of action, and the demurrer to it should have been sustained.

The legislature of 1859 changed the statute, and extended the rule of decision, theretofore prevailing in justices' Courts alone, to cases originally commenced in the Common Pleas and Circuit Courts.

The statute of 1859 provides as follows:

"That whenever any animal or animals shall be killed or injured by the cars or locomotives, or other carriages used on any railroad in this state, the owner thereof may go before some justice of the peace of the county in which such injury occurred, and file his complaint in writing; and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company defendant, by service of summons by copy on any conductor of any train passing through said county; but in all cases when the value of any animal or animals so killed shall exceed 50 dollars, the owner or owners of any such animal or animals may file his complaint and prosecute his claim before such justice of the peace, in the Court of Common Pleas, or in the Circuit Court, at his option.

"Sec. 2. When such complaint shall be filed in the Circuit Court or Court of Common Pleas, the clerk of said Court shall issue a summons thereon as in other cases, which summons shall be served by the sheriff on the railroad company defendant at least ten days before the first day of the term at which such cause is to be heard, and



May Term, 1859. said summons may be served by copy on any conductor of any train passing through said county.

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THE STATE. "On the hearing of said cause, the Court or jury trying the same shall give judgment for the plaintiff for the value of the animal or animals destroyed or injury inflicted, without regard to the question whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident." Acts of 1859, p. 105.

This statute does not cure the error committed in the case at bar.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. P. Usher*, for the appellants.

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### MORGAN v. THE STATE.

The Supreme Court takes notice judicially of the commencement and close of the terms of the Circuit Court.

If there be a cause on trial undisposed of at twelve o'clock on the night of the last day of the term, it will be assumed that the term did not close until that time.

Section 793, 2 R. S. p. 222, contemplates an adjournment to a subsequent term, and not to a day in vacation.

In this case, upon the jury reporting that they could not agree, and the defendant not consenting to their discharge, the judge adjourned the Court on *Saturday*, the last day of the term, at six o'clock, P. M., until the next *Monday*, a day in vacation, without placing upon record any valid reason for such adjournment, and ordered the jury to be confined until that time. *Held*, that the order of adjournment, so far as it directed the Court to convene on *Monday*, and the confinement of the jury until that day, was a nullity; that the term was finally adjourned, and the cause discontinued.

Friday,  
June 10.

APPEAL from the *Monroe* Circuit Court.

DAVISON, J.—Indictment for murder. The record shows that at six o'clock, P. M., on *Saturday, November 13, 1858*, being the last day of the *November* term of said Court, the jury impaneled in this case returned into Court, and



informed the Court that there was no probability of their agreement as to a verdict; and the Court, having inquired of the parties if they would consent to a discharge of the jury, and the defendant having refused such consent, the judge adjourned the Court until *Monday* of the next week, being *Monday*, the 15th of *November*, and directed the jury to be kept confined until that time, and absented himself until said *Monday* at twelve o'clock, when the jury returned a verdict against the defendant for manslaughter, stating at the time, that the same was made between nine and ten o'clock, P. M., of the preceding *Saturday*, after the adjournment.

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THE STATE.

And thereupon the defendant objected to the reception of the verdict; but his objection was overruled, and the judge received it. He then moved that he be discharged from the prosecution, which motion was also overruled; and the judge, having refused a new trial, rendered judgment on the verdict, &c.

This Court will notice judicially that the *November* term, 1858, of the *Monroe* Circuit Court expired on *Saturday*, *November* 13; and further, that the *November* term of the *Morgan* Circuit Court in the same judicial circuit commenced on *Monday*, the 15th of said month. And it may be assumed—there being a case on trial and undisposed of at twelve o'clock of the night of *Saturday*—that that term of the *Monroe* Circuit Court did not expire until that hour; and had the Court, instead of adjourning at six o'clock, P. M., remained in session until the expiration of the term, an adjournment to the next term would have been in accordance with the ordinary mode of procedure, and the cause then in progress would have stood continued. 2 R. S. p. 8, § 19.

But in reference to this subject, we have a statutory rule, which says: "If any judge of the Circuit Court, &c., shall adjourn the Court before having gone through the business pending, and before the expiration of the time fixed by law, the record must show the reason for such adjournment." 2 R. S. p. 222, § 793.



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MORGAN  
V.  
THE STATE.

This provision contemplates an adjournment to a subsequent term, not to a day in vacation. If there is business pending, and the term is unexpired, the judge has no right, in any case, to adjourn beyond its expiration, unless such adjournment is made to reach a subsequent term of the Court, and not even then, unless the reason for the adjournment is made to appear in the record. But here, the judge, though he did adjourn while the term remained unexpired, and while a trial was in progress, has failed to place in the record any valid reason for such adjournment. And the result is, that the adjourning order, so far as it directs the Court to convene on *Monday*, the 15th of *November*, a day in vacation, and orders the jury to be confined until that day, is a nullity.

We are referred to *Wright v. The State*, 5 Ind. R. 290. In that case it was held, that the Circuit Court, having a trial before it at the close of the term, might continue its sitting until the case is fully determined. But it will at once be seen that that decision is not in point; because, in the case at bar, the order of adjournment was made at least six hours before the term closed by operation of law. In that space of time, it was clearly within the range of probability that the cause would have proceeded to final judgment, had the adjournment not been ordered. Indeed, the record plainly shows that such would have been the result, had the judge not absented himself, but continued the session of the Court until the term legally expired by lapse of time.

In view of the case made by the record, we must hold that the adjourning order in question terminated the sessions of the Court for the term in which it was made, and operated as a discontinuance of the cause then on trial. *Shearer v. Clay*, 1 Litt. 263.—*Archer v. Ross*, 2 Scam. 303. The verdict and judgment are, therefore, inoperative and void.

*Per Curiam*.—The judgment is reversed. Cause remanded, &c.

*J. Hughes* and *D. W. Voorhees*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.



## HATFIELD and Another v. REED.

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1859.WEBB  
v.  
THORPE.APPEAL from the *Fayette* Court of Common Pleas.

*Per Curiam.*—Reed sued the appellants, who are mill owners, on the following receipt:

Monday,  
June 13.

"Null Mills, December 25, 1855. Received of John Reed, two hundred bushels wheat in store. Hatfield and McIlwaine."

Averment that the wheat was to be returned on demand, or the value of wheat at the time of such demand, paid, &c.

Denial, and also several special defenses, filed, which need not be further noticed, as the only point relied on by brief of appellants is, that the evidence does not sustain the allegations of the complaint. The plaintiff had judgment for 270 dollars.

It is insisted that the plaintiff declared upon an alternative contract, and that the evidence discloses a conditional one.

We have examined the evidence, and think that it tends strongly to sustain the finding and judgment. We cannot, therefore, disturb the judgment.

The judgment is affirmed with 10 per cent. damages and costs.

*B. F. Claypool*, for the appellants.

## WEBB v. THORPE and Another.

APPEAL from the *Decatur* Court of Common Pleas. Monday,Monday,  
June 13.

*Per Curiam.*—This suit originated before a justice of the peace, where the plaintiff had judgment for 10 dollars. The defendant appealed to the Common Pleas, where, on his motion, the cause was dismissed. The plaintiff appeals to this Court. This Court has no jurisdiction of the



May Term, case. 2 R. S. p. 158, § 550.—*Bogart v. The City of New*  
 1859. *Albany*, 1 Ind. R. 38.

**SHEARER** The appeal is dismissed with costs.  
 v.  
**THE EVANS-** *J. Gavin* and *O. B. Hord*, for the appellant.  
**VILLE, &C.,** *J. S. Scobey* and *W. Cumback*, for the appellees.  
**RAILROAD CO.**

**SHEARER v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.**

*Monday,*  
*June 13.*

**APPEAL** from the *Morgan* Circuit Court.

*Per Curiam*.—Action by the company against *Shearer* on a subscription to the capital stock of the company. The subscription is as follows, viz.:

“The undersigned subscribe to the capital stock of the *Evansville, Indianapolis, and Cleveland Straight Line Railroad Company*, the amounts and lands attached to our names, upon the following express conditions: That the road shall be permanently located on the east side of *White* river, within one mile of the line run between *Indianapolis* and *Spencer*.

*August 11, 1853.* [Signed] *William Shearer, 20,*  
*if Martinsville is made a point.”*

The complaint avers that the plaintiff has in all things fully performed the condition of the subscription.

There was a general denial filed, as well as other pleadings, which it is unnecessary to notice.

Trial by the Court, and finding for the plaintiff. Judgment on the finding, a motion for a new trial being overruled.

In a case between the same parties (10 Ind. R. 244), it was settled that the defendant was not liable on the subscription until the plaintiffs had performed the conditions upon which the subscription was made.

Upon a careful examination of the testimony, we think it was not proven that the plaintiffs had performed all the



conditions. We think the evidence does not show that the road was permanently located "within one mile of the line run between *Indianapolis* and *Spencer*." This was an essential part of the condition—as much so as that the road should be located on the east side of *White* river, or that *Martinsville* should be made a point. For this reason the motion for a new trial should have prevailed.

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1859.

KERSCH-  
BAUGHER  
v.  
SLUSSER.

The judgment is reversed with costs. Cause remanded for a new trial.

*W. R. Harrison, J. W. Gordon, and J. H. Connor, for the appellant.*

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KERSCHBAUGHER v. SLUSSER.

Where slanderous words are uttered in a foreign language, the complaint should set out the words in that language, with a translation.

If slanderous words are charged to have been spoken in the *English* language, there will be a variance if the proof show that they were spoken in another language. The code has not changed the rule.

After the jury are sworn, and have heard a part of the evidence, a new issue should not be tendered without cause shown; and if the issues are permitted to be changed, the jury must be re-sworn.

APPEAL from the *Huntington* Circuit Court.

Monday,  
June 13.

HANNA, J.—This was an action for slander. Three sets of words were laid in the complaint, as having been spoken by the defendant. One set laid in the *German* language, with an *English* translation. Two sets in the *English* language. General denial. After the plaintiff had closed his evidence to the jury, the defendant asked and obtained leave, over the objection of the plaintiff, to file an answer, setting up the statute of limitations.

The Court refused to give the following instruction asked by the plaintiff:

"That under the present practice, no language can be recognized in the pleadings but the *English*; hence, it is



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1859.

KERSCH-  
BAUGHER  
v.  
SLUSSER.

unnecessary for the plaintiff in the case to allege the slanderous words to have been spoken in any other language than the *English*, although they might have been spoken in a different language."

The jury found generally for the defendant, and also as follows, upon special points, to-wit:

"Question 1. Did the defendant speak, of and concerning the plaintiff, the following words in the *German* language, and if so when:—'Conrad could have stayed in my house longer, if he had not stolen corn out of my crib, but by his stealing corn he must leave?'

"Answer. 'Yes;' in *April*, 1854.

"Question 2. Did he speak the following words, and when:—'Conrad stole corn out of my crib, now he must leave my house?'

"Answer—'Yes;' time not proven.

"Question 3. Did he speak the following words, and when:—'His fingers are too long, so long that they reached into my corn crib, and took my corn out of it?'

"Answer. 'Yes;' time not proven."

The speaking, in the answer to the first question alluded to, was, it will be observed, barred by the statute, if that was properly pleaded. And as to the sets of words in the other two special questions mentioned, there is nothing in the complaint showing, by averment or otherwise, that they were spoken in any language other than the *English*. It is, therefore, insisted that, as the publication of the slanderous words is found by the jury to have taken place, as in said sets of words charged, the general verdict would have been for the plaintiff, but for the refusal of the Court to give the instruction asked. The ruling of the Court was right. Where the words were uttered in a foreign language, the averment should be in accordance with the fact, setting forth the words in that language, together with a translation thereof. If they are alleged as having been spoken in the *English* language, it will be a variance if the proof is that they were spoken in a foreign language. 3 Phil. Ev. (10th ed.) p. 551. We do not think,



as is insisted by the appellant, that our new system of procedure has changed the rule in that respect.

As to the next point, it is provided by our statute (2 R. S. p. 48, § 99), that "the Court may, at any time in its discretion, &c., direct, &c., any material allegation to be inserted, &c., to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense."

It is insisted that, under the statute above referred to, the ruling of the Court in permitting the defendant to file the additional answer was proper. We have decided a very similar question heretofore, in the case of *Kerstetter v. Raymond*, 10 Ind. R. 199, in which it was held that after the jury was sworn, and had heard a part of the evidence, a new issue should not be tendered without cause shown, and then it would involve the necessity of re-swearing the jury to permit such change of the issues, for it would be, to some extent, a change of the questions to be tried.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. R. Slack*, for the appellant.

*L. P. Milligan*, for the appellee.

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### DEARMOND and Others v. DEARMOND and Others.

Every man being presumed to be sane until the contrary appears, the rejection of evidence tending to prove the sanity of the grantor in a deed, where no evidence has been introduced to prove him insane, is not error.

Where a complaint to set aside a deed was not grounded on the incapacity of the grantor, but on the non-delivery of the instrument, testimony of incapacity was held to be irrelevant.

Testimony sought to be evoked on cross-examination, which is not germane to any matter testified to on the examination in chief, and not pertinent to the issue, must be ruled out.

If a party wishes to examine a witness of the opposite party touching a matter not testified to upon his examination in chief, he must make the witness his own.

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DEARMOND.

Where a defendant to an action for the cancellation of a deed for non-delivery, conveyed his interest in the land, after the suit was commenced, and the issues formed, but before the trial, it was held that, under the code, his co-defendants could not introduce him as a witness to prove the delivery of the deed, without having his name stricken from the record as a party; that the striking out of the party's name was a matter of discretion for the Court; and that where a discretionary power is not improperly exercised, the Supreme Court will not interfere.

Where the party whose name is sought to be thus stricken out has made costs, and the motion to strike out is not accompanied by an offer to pay costs, or let a judgment be rendered against him for costs, it is not error to refuse to discharge him.

Monday,  
June 13.

### APPEAL from the *Fayette* Circuit Court.

WORDEN, J.—This was an action by the appellees against the appellants to set aside a conveyance of certain real estate. The plaintiffs below were a part of the heirs at law of *William L. Dearmond*, deceased, and the defendants were the remainder of those heirs. The complaint alleges, in substance, that on the 1st of *October*, 1852, the decedent, *William L. Dearmond*, made and acknowledged a deed for certain lands therein described, purporting to convey said lands to the defendants, but that said deed was never, in any manner, delivered by the grantor to said grantees, but on the contrary thereof, was retained and kept by the grantor until the time of his death, which happened in *December*, 1853, when it was found among his papers, and fraudulently seized upon; and that afterwards, on the 6th of *February*, 1854, the defendants caused the deed to be recorded, and are now setting up and claiming title to the land, and have taken possession of the same under the deed.

Prayer, that the deed may be set aside, &c.

Answer in denial, averring that the deed was executed and delivered for a good and valuable consideration, &c.

Trial by jury; verdict and judgment for plaintiffs, a motion for a new trial being overruled.

On the trial, the plaintiffs having called and examined as a witness, one *John S. Springer*, the defendants, on cross-examination, proposed to prove by the witness, that the deceased was of sound mind, and capable of transact-



ing his business, from the time of the making of the deed up to the time of his death; but the Court ruled out the evidence, saying to the jury that his sanity would be presumed. There was no error in this ruling. There had been no evidence given as to the sanity or insanity of the grantor. Every man is presumed to be of sane mind until the contrary appears. 1 Greenl. Ev., § 42.

But besides this, the evidence was entirely without the issues in the case. The plaintiffs, in their complaint, had not sought to set aside the deed on the ground of the incapacity of the grantor, but simply on the ground that the deed was never delivered. Hence, the testimony was wholly irrelevant.

On the cross-examination of another witness, *Joel Rhodes*, a brother of the widow of the deceased, the defendants offered to prove that said widow, during her coverture with the deceased, abandoned the bed and board of her said husband, and ran away from him, on account of difficulties between them, and was advertised by him in the usual manner; but this testimony was ruled out. This was not a legitimate cross-examination as to any matter testified to by the witness in his examination in chief; nor can we perceive its relevancy to the question in issue between the parties, viz.—the delivery of the deed. We see no error in this ruling.

The plaintiffs called as a witness, one *James Stevens*, and proved by him that *Alfred Dearmond*, one of the defendants, had told the witness that he, *Alfred*, accused the widow of taking money and burning the deeds. He did not specify what deeds he referred to, nor tell what induced him to suspect the widow of taking the money and burning the deeds. On the cross-examination, the defendants offered to prove by the witness "the reasons for the defendants' suspicions of the said widow, as deposed to by the said witness;" but the Court ruled out the evidence. The witness had already testified that *Alfred* did not tell what induced him to suspect the widow of taking the money and burning the deeds; and we understand the evidence offered to be what the witness knew about the cause of

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such suspicions, independently of what *Alfred* said about it. In our judgment the ruling of the Court was correct. The evidence offered was not a legitimate cross-examination, but went to a matter not embraced in the examination in chief. The examination in chief went merely to the declaration of one of the defendants.

On a cross-examination, the defendants would have the undoubted right to draw out all that was said at the time, in relation to the subject about which the statements sworn to were made. This, however, was not the character of the testimony offered. The testimony of the witness, in chief, was, that one of the defendants admitted that he had accused the widow of taking the money and burning the deeds. The testimony offered on cross-examination was, the reason of such accusation, not from what was said, but from other sources of information. The rule, we think, is well established, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination; and if he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. 1 Greenl. Ev., § 445.

This evidence, we think, was also wholly immaterial and irrelevant. The statements proven by the witness in his examination in chief, could only have been admissible, as far as we can discover, for the purpose of affording an inference that the deed which the defendant, *Alfred*, accused the widow of burning, was in her possession, and not in the possession of the defendants, and this might probably be considered by the jury in determining whether the deed had ever been delivered to the defendants. But the reasons which caused the defendants to entertain such suspicions, we think, could throw no light upon the question as to the delivery of the deed.

After the evidence was closed on the part of the plaintiffs, the defendants produced the affidavit of *William Dearmond*, one of the defendants, by which it appeared that on the 25th of *June*, 1855, he, for a valuable considera-



tion, sold and conveyed his interest in and to the land in controversy to *Milton Dearmond*, another of the defendants, and gave him a quitclaim deed therefor, wherefore he had no interest in the event of the suit. They also produced the affidavit of said *Milton Dearmond*, stating substantially the same facts, and that affiant knew of no other witness except the said *William*, by whom he could prove the delivery of the deed in question, and that he was informed and believed that said *William* had no interest in the event of the suit, and praying that the name of said *William* might be stricken out of the record, and he be admitted as a witness to prove the consideration and delivery of the deed. The deed from *William* to *Milton* was also produced.

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The defendants thereupon moved to strike out the name of said *William* as a party to the suit, with a view of making him a witness to testify to the following facts, viz.:

“That the witness contracted with his father, the grantor, for the land described in the deed, about a year before the deed was executed, and paid a valuable consideration for the same, with the understanding that the grantor was to retain the possession, and have the use of the land so long as he should live; that the contract was then consummated; that the grantor brought him the deed within some three days after its execution, and delivered it to him, telling him to keep it for himself and the other children therein; that said *William* took the deed, examined it, and found it drawn agreeably to the contract; that the grantor then gave him permission to get the deed recorded at once, if he desired to do so, but as the grantor was to retain the possession, and have the profits of the land, so long as he lived, it was finally agreed that the deed should not then be recorded, but that the grantor should retain the same in his possession in a certain stand drawer, where the grantees could find and get the same after his death, and that the deed was again placed in the grantor's possession for that purpose; that at this time, he had no knowledge or intimation that his father ever intended to marry again, and that he did not believe then that he ever



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would marry again; that the grantor then assigned as the only reason why he wished the matter of the existence of the deed kept from being made public, except to those for whose benefit it was made, was, that his other children had been contrary, and had caused him a great deal of trouble, and if they knew it, they would perhaps keep it up."

The Court overruled the motion, and said *William* was not permitted to testify.

It perhaps should be observed that the transfer from *William* to *Milton* was made after the suit was commenced and the issues made up, but before the trial.

It is insisted that the above ruling of the Court was erroneous, and that the testimony of said *William*, on the points proposed should have been received.

Could the testimony offered have been received, although the proposed witness was a party-defendant?

It is provided by § 238, 2 R. S. p. 80, that "No person offered as a witness shall be excluded from giving evidence, either in person or by deposition, in any judicial proceeding, by reason of incapacity from crime or interest. But this section shall not render competent a party to an action, or the person for whose use it is brought, or the husband or wife of any such party."

At common law, a liability for costs was such an interest as excluded a person from testifying. 1 Greenl. Ev., § 401. The above statute rendering competent an interested party, does not render competent a party to an action; hence it is not applicable to the case under consideration.

Section 302 of the code, provides that "A party may be examined on behalf of his co-plaintiff or co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not a joint judgment shall be rendered," &c.

We are of opinion that the testimony offered was not competent under this provision. The testimony went to a matter in which the defendants were all jointly interested, viz., the delivery of the deed. The controversy was of



such a character that a separate judgment could not be rendered. If the deed was never delivered, it, of course, is void as to all the defendants, and if delivered, as intimated in the proposed evidence, it would be good as to all the defendants.

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The transfer by the proposed witness, of his interest in the land in controversy, did not render him competent, because he was still a party to the record, and, as such, was liable for costs, and that liability he could not avoid by transferring his interest in the matter in suit to a co-defendant.

Did the Court below err in refusing to permit the name of the proposed witness to be stricken from the record as a defendant, and thereby render him a competent witness?

This rested in the discretion of the Court below. By the transfer, the cause was not abated as to the said *William*, and might proceed against him as well as the other defendants; or his name might be stricken out. 2 R. S. p. 32, § 21, and p. 48, § 99. See, also, *Dearmond v. Dearmond*, 10 Ind. R. 191.

There is nothing in the case showing that the discretion vested in the Court below has been improperly exercised, and where that is the case this Court will not interfere.

The party whose name was sought to be stricken out, was liable for costs, and the motion to strike out was not accompanied by any offer to pay the costs up to that time, or to let judgment go against him for the costs. He had joined with the other defendants in setting up a title in themselves in the land through the deed, the delivery of which was attempted to be proven by him; and we think that where a defendant has thus made costs, it is not error to refuse to discharge him, and thus relieve him from a liability to pay them, or pay costs that the plaintiffs might recover.

We do not wish to be understood as deciding that if he had succeeded in getting his name stricken from the record, he would have been a competent witness upon the points proposed to be proven by him. When such question arises directly, it will be time to decide it.



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The defendants asked several instructions to the jury, which were refused; but we are of opinion that they were all substantially embodied in the charge given by the Court.

Where the charge refused is substantially given by the Court, though in another form, such refusal is not erroneous. *Gentry v. Barges*, 6 Blackf. 261.—*Nelson v. Hardy*, 7 Ind. R. 364.

The Court gave a general charge to the jury, which was excepted to by the defendants; but we think it, on the whole, as favorable to them as they could ask. As no objection whatever to the charge given, has been pointed out in the brief of counsel, we have not thought it proper to lengthen this opinion by copying it.

There is no error assigned upon the refusal of the Court to grant a new trial. The assignment is "that the verdict is not sustained by the evidence, and is contrary to law." Passing by the question whether this assignment is sufficient, we may remark that we think the verdict is sustained by the evidence, and that it cannot be disturbed.

We see no error in the record, and the judgment must be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

*S. W. Parker, J. C. McIntosh, J. S. Reid, and S. Heron*, for the appellants.

*J. Ryman and B. Spooner*, for the appellees.

#### RUFFNER v. McTAGGERT.

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June 13.

APPEAL from the *Whitley* Court of Common Pleas.

*Per Curiam*.—The appellee, who was the plaintiff, sued *McTaggart* upon a promissory note for the payment of 291 dollars.

Defendant answered—

1. That when this action was commenced, the plaintiff



was, and still is, indebted to the defendant 300 dollars for money paid by him to the plaintiff, and he offers to set off against the amount due to the plaintiff an amount equal thereto, and demands judgment for the residue, &c.

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V.  
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2. That he is not indebted to the plaintiff in manner and form as in the complaint alleged.

Demurrer to the first paragraph sustained. And the issue made by the second was thereupon submitted to the Court, who found for the plaintiff 210 dollars, and judgment was accordingly rendered, &c.

For error, the appellant assigns—

1. That the Court sustained a demurrer to the general issue.

2. That there was no issue between the parties.

As neither of the alleged errors appears in the record, the judgment must be affirmed.

The judgment is affirmed with 10 per cent. damages and costs.

*W. S. Smith* and *D. H. Colerick*, for the appellant.

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LEEPER v. SHAWMAN, Administrator.

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In a complaint setting up a breach of a warranty of soundness, the breach stated must be coextensive with the contract of warranty. It may negative the words of the contract. The particular unsoundness need not be stated. More particularity is necessary in declaring on a special, conditional, or partial warranty, than on a general and absolute warranty. *It seems*, that a breach of an affirmative character must be stated with more particularity than one of a negative character.

APPEAL from the *Miami* Court of Common Pleas. *Monday,*

HANNA, J.—*Leeper* filed a claim against the estate of *Ketrow*, which, among other things, alleged that on, &c., at, &c., the said *Ketrow* was the owner of a certain mare, &c.; that said *Ketrow* then and there represented said mare to be sound, and warranted and guarantied her to

*June 13.*



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SHAWMAN.

be free from any and all diseases, blemishes, and faults whatsoever; that the plaintiff, confiding, &c., purchased said mare, and paid for same 65 dollars; that said mare was in fact, at the time, disordered and diseased, from which disease and disorder she was entirely worthless, and died in one month after said purchase, &c.

Demurrer to the claim or complaint, assigning three causes—

1. That the complaint does not state facts sufficient, &c.
2. That the terms of a warranty are not sufficiently stated.
3. That it does not allege sufficiently that the terms of the warranty were broken or failed.

The statute requires a succinct statement of the nature and amount of every claim to be filed. 2 R. S. p. 260.

The following propositions are laid down in the work quoted, as a sufficient form of pleading in actions for breach of warranty:

“The breach stated must be coëxtensive with the contract of warranty. The breach may be in the negative of the words of the contract; the particular description of unsoundness, &c., need not be stated, though in some cases it is usual to do so.” 2 Saund. Pl. and Ev. 1226.

More particularity is necessary, in declaring on a special, conditional, or partial warranty, than on one of the character set forth in the complaint in the case at bar. It is also sometimes said that a breach of an affirmative character requires more particularity than one of a negative character. 1 *id.* 216, 218.

The demurrer should have been overruled.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*H. J. Shirk* and *J. M. Wilson*, for the appellant.

*N. O. Ross* and *R. P. Effinger*, for the appellee.



## McDANIEL v. GRAVES and Another.

May Term,  
1859.McDANIEL  
v.  
GRAVES.

The statutory rule touching new trials on account of newly discovered evidence, that the application must be in writing and sustained by affidavit, applies, whether the application be made at or after the term at which the verdict was rendered.

A complaint for a new trial on account of evidence discovered after the term at which the verdict was rendered, is defective without an affidavit showing the truth of the alleged cause.

And if the complaint does not show upon its face that the new evidence was not discovered during the term at which the verdict was rendered, it is bad. An averment that it was discovered since the trial of the cause is not sufficient.

APPEAL from the *Boone* Circuit Court.Monday,  
June 13.

DAVISON, J.—This was a complaint under § 356 of the practice act, for a new trial. That section provides that, “Where causes for a new trial are discovered after the term at which the verdict is rendered, the application may be made by complaint filed with the clerk not later than the second term after the ‘discovery,’ on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for a hearing at the term to which the summons is returned executed, and shall be summarily decided by the Court, upon the evidence produced by the parties. But no such application shall be made more than one year after the final judgment was rendered.” 2 R. S. p. 119.

In this case, the complaint avers that the appellees, *Groves* and *Noffsinger*, at the *March* term of said Court, 1855, recovered a judgment against *McDaniel*, the appellant, on a promissory note given by him to one *John H. George*, and which, as they allege, had been assigned and delivered to them by said *George* without indorsement; and that *McDaniel*, the then defendant, in his answer to the complaint on said note, set up affirmatively that he had fully paid the note to *George* before he assigned it to *Groves* and *Noffsinger*, and that they, at the time said note was so assigned, had full notice of such payment.



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McDANIEL  
v.  
GRAVES.

And it is further averred, that the defense thus set up to the note is true; but that he, *McDaniel*, failed to sustain it by proof; that since the trial of the cause, in which judgment was so rendered against him at said term, he has ascertained that he can prove by one *Rhoda George*, who is a resident of *Lafayette, Indiana*, the payment alleged in his defense, and that until after said trial, he had no information or knowledge that he could make such proof, &c. The relief prayed is, that the judgment upon the note be set aside, and a new trial granted, &c.

To this complaint, *Groves* and *Noffsinger* demurred on two grounds—

1. That the complaint is unsustained by affidavit.
2. That it fails to allege that the evidence relied on was discovered after the term of the Court at which the verdict was rendered.

The Court sustained the demurrer; and thereupon *McDaniel* moved for leave to amend the complaint by attaching thereto his affidavit, showing a discovery of the evidence after the term at which the verdict was rendered, and also what he expected to prove by the witness; but the Court refused to allow the proposed amendment, and rendered judgment, &c.

Where a new trial is sought because of newly discovered evidence, the statutory rule is, that the application founded on that cause be in writing, and sustained by affidavit. 2 R. S. p. 119, § 355. And this rule, under a fair construction of the statute, applies whether such application be made at or after the term in which the verdict was rendered. It follows that the complaint before us, there being no affidavit showing the truth of the alleged cause, must be held defective.

But the second ground of demurrer is also well taken; because, for aught that appears on the face of the complaint, the new evidence may have been discovered during the term at which the cause was tried and determined. The averment that *McDaniel* had discovered the evidence since the trial of the cause was insufficient.

In reference to the action of the Court in its refusal to



grant leave to amend, it may be noted that the proposed amendment, had it been allowed, would still have left the complaint defective, for the want of an averment that the alleged cause for a new trial had been discovered after the term at which the verdict was rendered. Hence its refusal was not effective as an injury to the plaintiff. The judgment must be affirmed.

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LANGSDALE  
v.  
BONTON.

*Per Curiam*.—The judgment is affirmed with costs.

*O. S. Hamilton*, for the appellant.

*I. Naylor*, for the appellees.

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LANGSDALE v. BONTON.

Where it is not in conflict with some provision of the charter, the acts of the directors of a corporation may be proved by parol.

In an action to recover damages for obstructing a highway, it is no defense that the plaintiff is guilty of obstructing it on his own land.

An encroachment upon a street by fencing in a part of it is a public nuisance which a Court of chancery might, it seems, have restrained by injunction.

Where the evidence is not in the record, a verdict, though informal, in stating conclusions of law without the facts upon which they rested, will be presumed to have been sustained by the evidence.

Where the parties have submitted special interrogatories to the jury, one of which required a special finding upon all the issues, it is not error to refuse an instruction to the same effect.

APPEAL from the *Marion* Circuit Court.

Monday,  
June 13.

PERKINS, J.—Complaint for an injunction restraining the continuance of a nuisance in a highway. Perpetual injunction granted.

The complaint alleges that the *Indianapolis and Cincinnati Railroad Company* was the owner of an eighty-acre tract of land adjoining the city of *Indianapolis*; that they divided a part of it into lots, making a plat thereof, on which were designated streets, &c.; that the plaintiff below, with divers other persons, purchased lots on the east side of one of said streets; that prior to these transac-



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LANGSDALE  
v.  
BOSTON.

tions, *Langsdale*, the defendant below, had purchased ten acres on the west side of said street; that the deed to *Langsdale* contained this reservation, viz.: "Reserving, however, to said company the right to open a street sixty feet wide, at the east side of said premises, the entire length thereof, thirty feet in width whereof shall be taken off the east side of said premises hereby conveyed, without compensation to said *Langsdale*. Said street is only to be opened at the option of said company, and if opened, shall be opened within three years from the date hereof, and not within the months of *April, May, June, July, August, or September*. So much of the above premises as is covered by the *National* road, is conveyed subject to the easement of the public." This deed is dated the 8th of *April, 1852*.

It is averred that the company opened the street on, &c., agreeably to the right reserved; but that *Langsdale* is permanently obstructing it, by, &c.

The cause was put at issue, and a jury called to try it. The jury returned the following special verdict:

"We, the jury, find—

"1. That the plaintiff is entitled to have the street in controversy opened and unobstructed, to the extent of thirty feet west of the east line of said ten-acre lot of said *Langsdale*.

"2. That *Langsdale* was engaged in obstructing said street with a fence within said thirty feet when this suit was commenced, and that said *Langsdale* ought to be perpetually enjoined from constructing such fence, west of the east line of said *Langsdale's* land.

*E. Culver, Foreman.*"

The defendant moved for a new trial. The Court overruled the motion, and adjudged that the street had been opened, was a public highway, and that the defendant should be perpetually enjoined from obstructing it, &c.

The first bill of exceptions reads as follows:

"*Boston v. Langsdale et al.* Be it remembered that on the trial of this cause, it was admitted by the parties that no entry was ever recorded on the books of the *Indianapo-*



*lis and Cincinnati Railroad Company*, of any vote, resolution, or order, in relation to the determination of said company to open the street mentioned in the complaint; and thereupon the plaintiff offered to prove by the parol testimony of one *William Robson*, a director in, and the real estate agent of, the company, that the directors of said company did, within three years after the date of the deed to *Langsdale* named in the complaint, by a vote of their board, resolve to open said street, and did vote, at a meeting of said directors, within said period, that said street should be opened, of which said defendant, *Langsdale*, was notified by said *Robson* within said time: to the giving of which testimony said *Langsdale* objected; but the Court overruled the objection, and said testimony was given; to which ruling of the Court the defendant at the time excepted.

*Stephen Major*, [seal.]”

This ruling of the Court was correct. Where it is not in conflict with some provision of the charter, the acts of the directors of a corporation, if not recorded, may be proved by parol. Redf. on Railw., p. 21, note 2.—*Ross v. The City of Madison*, 1 Ind. R. 281.—Ang. and Ames on Corp., p. 270.

We see nothing, it may be observed, imposing the duty upon the company of notifying *Langsdale* of its election to open the street.

The Court was asked to instruct the jury, that if the plaintiff was also guilty of obstructing the street upon his own land, he could not maintain this suit. The Court refused the instruction. As the evidence is not of record, this Court might presume the instruction rightly refused, as not justified by the evidence. But it is decided that in an action to recover damages for obstructing a highway, it is no defense that the plaintiff is guilty of obstructing it upon his own land. *Ricker v. Barry*, 34 Maine R. 116.

An encroachment upon a public street, of the kind perpetrated in this case, is a public nuisance which might, probably, have been restrained by injunction in a Court of Chancery. Eden on Inj. 261, 262.—Ang. on Highw. 263. But as the point is not made, we shall not elaborate it.

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1859.

LANGSDALE  
v.  
BENTON.



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1859.

THOM  
v.  
SOLENER-  
GER.

In the trial of this cause, some irregularities occurred, but none that prevented a fair trial of the merits. The verdict was informal. It assumed to be more than a general verdict for the plaintiff, and yet it was too vague for a special verdict. It asserted more conclusions of law than it found facts to rest conclusions upon. But the Circuit Court heard the whole of the evidence, which is not presented to us in the record. That Court must have been satisfied that it sustained the conclusions of the jury. Besides, the jury found, further, upon the different issues in the case, in answer to interrogatories propounded and directions given to them by both the plaintiff and the defendant.

The defendant also asked the Court to instruct the jury thus: "That the jury be required to find a special verdict in writing, upon all the issues." This was refused, and exception taken.

Why this instruction was not given, the record does not state; but its rejection, under the circumstances, could do no harm. Both parties had submitted special interrogatories and directions, one of which was that they should find specially upon all the issues of the case. These special directions were not withdrawn by either party, and they covered all the ground of the instruction. The jury responded to them all.

We think the merits of the case have been fairly tried, and that a just judgment has been reached, and that it should be affirmed with costs.

*Per Curiam*.—The judgment is affirmed with costs.

*D. M' Donald* and *A. G. Porter*, for the appellant.

*J. Morrison* and *C. C. Ray*, for the appellee.

THOM v. SOLENERGER and Another.

Monday,  
June 13.

APPEAL from the *Howard* Circuit Court.

*Per Curiam*.—In this case, though various errors are as-



signed, the record fails to show that any proper exception was taken to the rulings of the Court below.

The judgment is affirmed with costs.

*H. P. Biddle* and — *Brouse*, for the appellant.

May Term,  
1859.

JOHNSON  
v.  
PATTERSON.

. JOHNSON and Others v. PATTERSON and Others.

12 471  
143 237

Unless defendants were shown to be non-residents of the state, they could not be proceeded against by publication, under the R. S. 1843, p. 833, § 14; and § 40, 2 R. S. p. 36, is substantially the same.

The case of *The Unknown Heirs of Whitney v. Kimball*, 4 Ind. R. 546, approved.

APPEAL from the *Hamilton* Circuit Court.

Wednesday,  
June 15.

WORDEN, J.—Bill in chancery filed in 1853, by the appellees against the appellants, to quiet and settle the title to certain real estate. The unknown heirs of *Elizabeth Holliday* were proper and necessary parties. They were made parties to the bill, and a decree taken against them, as well as the other defendants in the cause. They did not appear.

One of the errors assigned is, that the Court had not jurisdiction over them, they not having been duly notified, and the proper steps not having been taken to bring them into Court.

The statute provides that, "in cases where it shall be necessary to make any persons defendants to any bill, and the names of all or any of them shall be unknown to the complainant, and he shall annex to his bill, an affidavit of his want of knowledge of the names of such persons, and that their residence is, as he verily believes not in this state, proceedings may be had against them, without naming them, and the Court shall make such order respecting notice and the publication thereof, as they may deem proper." R. S. 1843, p. 833, § 14. The same provision is, in substance, reenacted in the code of 1852, vol. 2, p. 36, § 40.



May Term,  
1859.

THE NEW  
ALBANY, &C.,  
RAILROAD Co.

v.

McPHERTERS.

There was an affidavit of the solicitor for the complainants filed, that he had been informed and believed that the names of the heirs of *Elizabeth Holliday* were unknown to the complainants; but there was no affidavit of any of the complainants, or other person, that those heirs were not, as he verily believed, residents of the state of *Indiana*. There was publication made as to those heirs, but no order of the Court appears to have been made respecting notice and the publication thereof, in the manner directed by the statute.

Passing over the question whether the solicitor could make a sufficient affidavit as to the complainants' want of knowledge of the names of the heirs; and also as to the validity of a publication made without a previous order of Court in reference to it, we are of opinion that the proceedings are fatally defective, in not showing that such heirs were not residents of the state of *Indiana*. Unless they were shown to be non-residents, they could not be proceeded against by publication, at all. The statute in question must be substantially complied with, which is not done in the present case. See *The Unknown Heirs of Whitney v. Kimball*, 4 Ind. R. 546.

For this reason the judgment will have to be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Davis*, for the appellants.

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THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
McPHERTERS.

An award, to be of any validity, must, under the statute, be signed by an attesting witness, before the expiration of the official existence of the arbitrators.

Wednesday,  
June 15.

APPEAL from the *Monroe* Court of Common Pleas.  
PERKINS, J.—*Joseph G. McPheters* and the *New Albany*



*and Salem Railroad Company* referred their pending differences to arbitration, making the submission a rule of the Court of Common Pleas of *Monroe* county. The terms of submission required that "the award should be reduced to writing, and a copy thereof be delivered to each of said parties, by the 13th day of *January*, 1857."

May Term,  
1859.

THE NEW  
ALBANY, & C.,  
RAILROAD CO.  
V.  
McPHERTERS.

On the 10th day of *January*, the arbitrators pretended to make their award. They returned over 1,000 dollars in favor of *McPheters*; but on presenting the copy of the award to the Court for entry of record, he showed to the Court that, by a clerical error, it was for too large an amount, and that the true amount awarded was 624 dollars, 96 cents, and for that sum he asked that a rule to show cause, &c., upon the other party be entered and served.

The award was not signed by an attesting witness when it was presented to the Court for entry of record, and the Court permitted it to be then signed; but the copy of the award delivered to the railroad company, never had the name, or a copy thereof, of an attesting witness attached to it. There was judgment, over the defendant's objection, on the award.

We do not see how this judgment can be sustained.

The award of the arbitrators, by the terms of submission, was to be made by the 13th of *January*, 1857. It was to be made in a statutory arbitration, as it was to be made a rule of Court. It was necessary that the award should be complete at that time, as the arbitrators, without the consent of both parties, would have no power, to act afterwards; and no consent for an extension of time was given by the parties.

It is held, in *The Jeffersonville, &c., Co. v. Mounts*, 7 Ind. R. 669, that an award, under the statute, to be of any validity, must be attested by a subscribing witness. Ind. Dig. 133.—2 R. S. p. 229, § 9.

The award, then, in this case, before it could have any validity, before, in fact, it could be an award, must necessarily have been signed by an attesting witness.

It was not so signed before the 13th day of *January*,



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1859.

DOYLE  
v.  
KISER.

1857, the day by or before which the power of the arbitrators to act in the premises, ceased. It did not, then, become an award within the official existence of the arbitrators, and could not afterwards. At all events, no copy of a valid award was delivered to the railroad company, as it was not attested when such delivery was made.

It seems that no award has ever been made pursuant to the submission. 2 Phil. Ev. (ed. 1859), p. 404. The Court should not have permitted it to be filed as the foundation for a rule to show cause.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Baker*, for the appellants.

#### ROBINSON v. RANSOM and Others.

Wednesday,  
June 15.

APPEAL from the *Marion* Court of Common Pleas.

*Per Curiam*.—The judgment in this case is affirmed, for the reason given in *Ward v. Buell*, 11 Ind. R. 327, the questions arising in the record of each case being similar.

The judgment is affirmed with 5 per cent. damages and costs.

*D. Moss* and *J. W. Evans*, for the appellant.

*S. Yandes* and *C. C. Hines*, for the appellees.

#### DOYLE v. KISER.

Wednesday,  
June 15.

APPEAL from the *Miami* Circuit Court.

*Per Curiam*.—Where erroneous instructions of the Court to the jury upon the trial of a cause, constitute the error for which the judgment in the cause is reversed by



the Supreme Court, such error will, as a general rule, render the whole trial an error, so far as to compel a reversal back through the trial to the issue. It renders a second trial of the issue necessary. Such was this case; and the reversal carried the costs of the erroneous trial had, by the express terms of the decision in 8 Ind. R. 396.

There may, perhaps, be cases of an equitable nature, where a reversal may extend through a part, and not the whole, of a trial, even for erroneous instructions; but this is not one of them. *Conner v. Winton*, 10 Ind. R. 25.

The judgment is reversed with costs. Cause remanded, &c.

*H. P. Biddle*, for the appellant.

*D. D. Pratt* and *D. M. Cox*, for the appellee.

May Term,  
1859.

LANE  
v.  
READY.

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LANE v. READY and Another.

APPEAL from the *Pulaski* Circuit Court.

Wednesday,  
June 15.

HANNA, J.—This was an action by the appellees against the appellant to enforce the specific performance of a contract.

The complaint alleges that, on the 1st of *November*, 1852, the defendant sold to the plaintiffs, a certain tract of land, and executed to them a title-bond conditioned that he would, upon the payment of a joint note by plaintiffs, then executed to the defendant, for the sum of 60 dollars, payable on the 25th day of *December*, 1852, execute a deed, &c.; that on the 25th of *December*, 1857, and on, &c., the plaintiffs tendered the amount of said note, and interest, &c., and also a deed properly prepared, &c., and demanded that the same should be executed; that defendant refused to perform, &c.; that the money was brought into Court, &c. Prayer, that defendant be compelled to perform the contract, and for relief, &c.

The defendant answered, that he did, on the day the note



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1859.

CARTER  
v.  
SIMONS.

became due and the contract was to be performed, tender a deed, prepared in pursuance of said contract, and the note, to *McCoy*, one of said plaintiffs (the other having left the country), and demand payment of said note; that *McCoy* refused to pay the note, which was then surrendered to him, and he abandoned the contract; that defendant, afterwards, in 1853, sold the land to one *Waldron*, received the purchase-money therefor, and executed a deed; that *Waldron* had no notice of the contract of plaintiffs, &c.

There was a demurrer to the answer sustained, and judgment for specific performance.

The demurrer should have been overruled. The answer is sufficient, if true, to preclude the plaintiffs' right to any relief. The demurrer admits it to be true, so far as it is well pleaded. So far as the pleadings show, no advantage had been derived by the defendant from the contract, which prevented him from treating it as rescinded, upon the non-payment of the note. His surrendering the note to one of the makers, and his subsequent sale of the land to one whom he alleges to have been an innocent purchaser, were acts strongly tending to show a rescission, without the averment which is made, and by the demurrer admitted, that the contract was abandoned. 2 Pars. on Cont., p. 188. — *Green v. Green*, 9 Cow. 50. — *Shirley v. Shirley*, 7 Blackf. 455.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*D. D. Pratt*, for the appellant.

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CARTER v. SIMONS.

Wednesday,  
June 15.

APPEAL from the *Hamilton* Court of Common Pleas.

*Per Curiam*.—Suit to foreclose a mortgage. The mortgage was to secure the payment of two notes, due at different times. The first note was due; the second, by ap-



pearance, was not; but the Court found there was a mistake in it, and that it was due. The evidence is not of record. Judgment by default, in proper form, in such cases, for the payment of the whole debt, or a sale of the property.

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1859.

SPAULDING  
v.  
THOMPSON.

Subsequently, the defendant appeared, and moved to set aside the default, and grant a trial, simply on the ground that the judgment rendered was erroneous. The Court denied the motion. The judgment was not erroneous. *Hunt v. Harding*, 11 Ind. R. 245.—*Allen v. Parker*, *id.* 504.

The judgment is affirmed with 5 per cent. damages and costs.

*E. S. Stone* and *W. W. Conner*, for the appellant.

*D. Moss* and *J. W. Evans*, for the appellee.

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#### SPAULDING and Another v. THOMPSON and Others.

The neglect of an attorney employed to defend a suit, is the neglect of the party employing him; and a party will not be entitled to relief from a judgment by default, on account of such neglect, unless it be shown to have been excusable.

An appeal will not lie from an order setting aside a default and judgment.

APPEAL from the *Marshall* Court of Common Pleas. *Wednesday, June 15.*

WORDEN, J.—The appellants recovered judgment against the appellees, in the Court below, by default, at the *October* term, 1854. Afterwards, at the *April* term, 1855, *Thompson* filed his affidavit setting out, amongst other things, that previously to the default, he had employed an attorney to attend to and make defense to the action; that he implicitly relied upon the attorney to attend to the suit, who, for some reason unknown to the affiant, wholly neglected to attend to the same, whereby judgment was rendered by default against him; and he prayed to be relieved from the judgment thus taken, as it was rendered against him through surprise, inadvertence, and the neglect of his attorney.



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1859.

HART  
v.  
THE INDIAN-  
APOLIS, &C.,  
RAILRO'D CO.

The Court granted the prayer, and set aside the default and judgment, and from this ruling the plaintiffs appeal to this Court.

These proceedings in setting aside the judgment, we suppose, were had under § 90 of the code, which authorizes the Court, in its discretion, at any time within one year, to "relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect." It is very questionable whether the mere neglect of an attorney employed to defend a cause, as in the case at bar, is an excusable neglect within the statute. It has generally been held that the neglect of an attorney employed by a party, is the neglect of the party himself; and without something being shown to render it excusable, we are not prepared to say that a party is entitled to relief.

But the appeal to this Court is premature. The order of the Court, setting aside the default and judgment, is not a "final judgment" from which an appeal lies to this Court. Code, § 550.—*Brankham v. The Fort Wayne and Southern Railroad Co.*, 7 Ind. R. 524. The questions involved being saved by a proper exception, when the cause shall be finally disposed of, all the points thus saved come up together. *Woolley v. The State*, 8 Ind. R. 377.

*Per Curiam*.—The appeal is dismissed with costs.

*J. W. Chapman* and *J. B. Merriwether*, for the appellants.

#### HART v. THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY.

Wednesday,  
June 15.

APPEAL from the *Decatur* Court of Common Pleas.

*Per Curiam*.—This was an action commenced before a justice of the peace for an animal killed by the cars of the company. Judgment for plaintiff. Appeal to the Common Pleas, where the case was submitted on an agreed



statement of facts, substantially as follows: That a steer of the plaintiff worth 15 or 16 dollars, was killed by the cars, and on the track of the road of the defendants, in *October, 1856*, at the said county, at a place where said road was not fenced, nor was it where it crossed any public highway, or in any incorporated town. The plaintiff did not own the land where said accident happened, nor any land nearer said road than one mile. He lived some three miles from the place, and had suffered the steer to go at large for the three months preceding, &c.

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1859.

THOMPSON  
v.  
HATHAWAY.

The Court found for the defendants, and, over a motion for a new trial, rendered a judgment on the finding.

All the questions raised in this case have been heretofore settled by this Court. See this same appellee v. *Townsend*, 10 Ind. R. 38; *The New Albany, &c., Co. v. Maiden*, at this term (1).

The judgment is reversed with costs. Cause remanded, &c.

*J. Gavin* and *O. B. Hord*, for the appellant.

*J. S. Scobey* and *W. Cumbach*, for the appellees.

*Ante*, 10.

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THOMPSON v. HATHAWAY.

APPEAL from the *Grant* Court of Common Pleas. *Wednesday, June 15.*

*Per Curiam*.—In this case, a question is raised as to whether the defendant appeared in the Court below. We think it sufficiently appears from the whole record that he appeared.

*Second*. It is said that the Court erred in sustaining the demurrer to the answer of defendant. We cannot pass upon this question, for the reason that, although the record states that a bill of exceptions was filed during the progress of the trial, yet it was not, as appears, filed until



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1859.

MILLIKIN  
v.  
OSBORNE.

during the vacation of said Court. It is not shown that any time beyond the term was given within which to file said bill; nor does said exception otherwise appear in the record.

The judgment is affirmed with 5 per cent. damages and costs.

*A. Steele and J. Brownlee*, for the appellant.

*D. Nation*, for the appellee.

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MILLIKIN v. OSBORNE.

Wednesday,  
June 15.

APPEAL from the *Howard* Court of Common Pleas.

HANNA, J.—Suit by *Osborn* against *Millikin* before a justice. Judgment for 29 dollars, 75 cents. Defendant appealed to the Common Pleas Court. Trial, and finding for plaintiff for 25 dollars, 5 dollars of which was remitted by the plaintiff. Judgment for 20 dollars and costs. Motion by defendant for new trial overruled and excepted to. Motion to retax the costs made by defendant and overruled, but no exception taken.

The judgment against the defendant for costs is the only error assigned.

Upon the record, as made and presented to us by the plaintiff, we do not perceive any error. There is no part of the transcript of the proceedings before the justice set out in the record before us, other than the judgment. We are not apprised whether there was any appearance by defendant before the justice. If he did not appear, he is not entitled to the benefit of § 70, 2 R. S. p. 464, upon which he founds his claim that he should have recovered costs of the plaintiff. The presumption is in favor of the ruling of the Court.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.



## HARVEY v. DAKIN.

May Term,  
1859.HARVEY  
v.  
DAKIN.12 481  
148 98

To a suit on a promissory note commenced in the Court of Common Pleas, an answer that the note was given for a tract of land to which the plaintiff fraudulently represented he had the fee simple title, when in fact the fee simple title was in a third person, does not oust the Court of jurisdiction.

APPEAL from the *Hendricks* Court of Common Pleas. *Wednesday, June 15.*  
PERKINS, J.—Suit upon a note.

Answer that the note was given for a certain tract of land; that the plaintiff fraudulently represented that he had the fee simple title to the land, while, in fact, the fee simple title was in one *Hiesler*. Reply in denial. Trial. Judgment for the plaintiff.

A new trial was moved for upon this single ground, that the Court had not jurisdiction, because the title to real estate was in issue.

The Court overruled the motion; and the question whether the title to real estate was put in issue by the pleadings is the only one before us. The evidence is not in the record.

It is necessary, therefore, to ascertain what was the real issue in the case. The defendant alleged two matters in his answer by way of defense—

1. That the note was executed for a certain piece of land, and that the plaintiff had not the fee simple title.

The answer does not say whether the conveyance for the land had or had not been executed, nor whether there had or had not been possession taken. Nor does it inform us whether the deed was to be one with covenants of warranty or not.

If the deed had been made, and was without covenants of warranty, and there was no fraud, the defendant does not show a failure of consideration for the note. He may have got all he contracted for. If the deed had not been made, and was to be a deed with covenants of warranty, still, it does not show that the time had arrived when the deed was to be made, nor that the party might not procure



May Term, 1859. the title, and be able to execute a good deed, by the time the contract required it to be done.

WOODCOCK v. PALMER. Independently of the fraud charged, therefore, the answer contains no defense. *Sweeney v. Sampson*, 5 Ind. R. 465.—*Hardesty v. Smith*, 3 *id.* 39.

2. The only matter in issue, then, was the fraud. The title to real estate was not necessarily involved. It could be, only incidentally, to disprove fraud; but if the representations of title were not first proved, the question upon the title could not arise at all.

But waiving the points discussed, the case can be rested upon the authority of *Rogers v. Perdue*, 7 Blackf. 302, and upon that case we put the decision. It may have turned out on the trial that the note was not given for land.

The whole question has become measurably unimportant, as by the acts of 1859, it is provided that in this and certain other classes of cases, the cause shall, where pleadings putting in issue the title of real estate are sworn to, be certified to the Circuit Court, and not be remanded, even if wrongly transferred. Acts of 1859, p. 93.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*D. M. Donald* and *A. G. Porter*, for the appellant.

*H. C. Newcomb* and *J. S. Tarkington*, for the appellee.

#### WOODCOCK v. PALMER.

Wednesday,  
June 15.

APPEAL from the *Bartholomew* Circuit Court.

*Per Curiam*.—The facts in this case are similar to those in *Woodcock v. McQueen*, 11 Ind. R. 14, and the conclusion therein arrived at is decisive in the case at bar.

The judgment is affirmed with costs.

*W. Herod* and *S. Stansifer*, for the appellant.

*N. T. Hauser*, for the appellee.



ADAMS and Others v. ROBINSON.

May Term,  
1859.LUNGER  
v.  
THE STATE.Wednesday,  
June 15.APPEAL from the *Lagrange* Circuit Court.*Per Curiam*.—This was a suit on a note. Judgment against the defendants by default.

The objections made by way of an assignment of errors, on the transcript originally filed, have been all removed by the amended transcript now on file, upon which no error is pointed out.

The judgment is affirmed with 10 per cent. damages and costs.

*J. M. Flagg*, for the appellants.*A. Ellison* and *R. Parrett*, for the appellee.

LUNGER v. THE STATE on the relation of HATHAWAY.

APPEAL from the *Fountain* Court of Common Pleas. *Wednesday, June 15.*

*Per Curiam*.—This was a petition by *Nimrod Hathaway* for the removal of *Harris Lunger*, as guardian of *Huldah Hathaway*, an infant. The petition was filed *May 9, 1855*, and the clerk of the Common Pleas on that day issued a notice, directed to the sheriff, commanding him to notify the defendant, *Lunger*, to appear before the judge of said Court on the 16th of *May*, in the same year, at the Court-house in *Covington*, at one o'clock, P. M., to answer the petition, &c. On that day, it being a day in vacation, and not in term of the Court, the parties appeared before the judge; and before entering upon the trial, the defendant moved to dismiss the petition, on the ground that the judge had no authority to hear and determine the cause in vacation; but his motion was overruled; and the judge, having heard the evidence touching the matters alleged in the petition, adjudged that defendant's letters of guardianship be revoked, &c.



May Term,  
1859.

GEBHART  
v.  
THE JUNC-  
TION RAIL-  
ROAD CO.

The general rule certainly is, that a judge has no power to proceed in the trial of a cause unless in term time. There are exceptions to this rule; but they do not apply to the case before us. A judge of the Common Pleas has, no doubt, the power to revoke letters of guardianship, for certain causes pointed out in the statute. 2 R. S. p. 325, § 11. But this he is authorized to do only while sitting as a Court at a regular term. The proceedings in this case having occurred in vacation, and not in term time, must be held inoperative.

The order revoking the letters, &c., is reversed with costs. Cause remanded, &c.

*J. Ristine*, for the appellant.

#### GEBHART v. THE JUNCTION RAILROAD COMPANY.

Wednesday,  
June 15.

APPEAL from the *Fayette* Circuit Court.

PERKINS, J.—Suit upon a subscription of stock reading as follows:

"We, the undersigned, hereby severally subscribe the number of shares, of 50 dollars each, set opposite our names respectively, to the capital stock of the *Junction Railroad Company*, with which the *Ohio and Indianapolis Railroad Company* has been consolidated, payment of said stock to be made in such installments as shall be required by the board, not exceeding 10 per cent. every sixty days.

May —, 1853.

Names.	Shares.	Amount.
<i>W. F. Gebhart.</i>	20	\$1,000."

The complaint did not aver that any installment of stock had been required by the directors.

Demurrer to the complaint for this cause. The demurrer was overruled. Judgment for the plaintiffs for the amount of the subscription.

The demurrer should have been sustained. No time for



the payment of the stock was fixed in the article of subscription. That was left to be fixed by the board of directors, with this only restriction, that not more than 10 per cent. of the sum subscribed could be made payable every sixty days. But if the board did not thus make the requisition for it, the stock did not become thus payable. No installment was due till it had been required by the board.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*N. and G. Trusler and B. F. Claypool*, for the appellant.  
*S. W. Parker and J. C. McIntosh*, for the appellees.

May Term,  
1859.

THE NEW  
ALBANY, &C.,  
RAILROAD CO.  
V.  
FIX.

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THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
FIX.

APPEAL from the *Floyd* Circuit Court.

*Per Curiam.*—The action was originally commenced before a justice of the peace, to recover the value of a horse injured and destroyed by a locomotive of said company, while running on their road. The justice gave judgment in favor of the plaintiff. The company appealed. In the Circuit Court, there was a trial which resulted in a finding for the plaintiff, upon which, a motion for a new trial being overruled, the Court rendered a judgment, &c.

Wednesday,  
June 15.

Upon the trial, it was proved that the plaintiff was the owner of the horse in question; that the horse was of the value of 85 dollars, and was killed by the defendants' locomotive, while running on their road, about one-half mile from their depot in *New Albany*. The railroad was not fenced. It was also proved that plaintiff lived six miles from *New Albany*, and had, or at least occupied, no land near the place where the horse was killed; and there was evidence tending to prove that plaintiff had stopped at a blacksmith's shop, about fifty yards from the railroad, and, while bargaining for a wagon, had hitched his horse, and



May Term, 1859. by the running of the train the horse was scared, broke loose, and afterwards went on the road where he was killed.

GUYNN  
v.  
JONES.

All the questions arising in the record in this case, have been repeatedly decided by this Court. See *The Indianapolis, &c., Railroad Co. v. Townsend*, 10 Ind. R. 38; *The Jeffersonville Railroad Co. v. Applegate*, id. 49; *The Indianapolis, &c., Railroad Co. v. Meek*, id. 502; *The Jeffersonville Railroad Co. v. Dougherty*, id. 549.

The judgment is affirmed with 5 per cent. damages and costs.

*W. G. Cooper*, for the appellants.

*J. Collins*, for the appellee.

GUYNN v. JONES, Administrator.

Wednesday,  
June 15.

APPEAL from the *Porter* Court of Common Pleas.

HANNA, J.—This was a suit by *Jones*, administrator of the estate of *Dye*, against *Guyenn*, for rents due for certain real estate of said *Dye*, and accrued after the death of said *Dye*.

*Guyenn* was defaulted, and, upon evidence heard, the damages were assessed by the Court. He now seeks to reverse this judgment, on the ground that the complaint does not show a cause of action in favor of said plaintiff against him, and that the judgment would not be a bar to a recovery by the heirs of *Dye*, for the same rents.

Our statute (2 R. S. p. 273) makes it the duty of the administrator of an estate, to take charge of, and rent, &c., the lands belonging to the estate in the absence of the heirs, &c., of the deceased.

The question raised is, whether, under this statute, the general averment in the complaint, that the plaintiff had authority to, and did, rent the property for, &c., is sufficient



without showing affirmatively that the heirs, &c., were not present, &c. May Term,  
1859.

We think the complaint is sufficient, keeping in view this statute, and the principle that a tenant should not be permitted to dispute his landholder's title at the time of renting. *Kinney v. Doe*, 8 Blackf. 350.

McCULLOUGH  
v.  
McCULLOUGH.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

A. G. Deavitt, for the appellant.

### McCULLOUGH v. McCULLOUGH.

Where part of an award relates to matters not within the terms of the submission, the whole award will be void unless that part can be distinguished from the residue.

Where an award thus embraces matters not authorized by the submission, the whole award will be void, unless it can be shown that such unauthorized part was so disconnected from the residue as to have no influence upon the consideration thereof.

Where a party undertakes, in his pleadings, to show that part of an award was unauthorized by the submission, and to maintain the residue, to entitle him to succeed, he must prove, 1. That the part which he seeks to have rejected relates to matters not submitted to the arbitrators; 2. That the residue is so distinct and complete in itself as to constitute a valid award after its rejection; and 3. That it had no influence upon the consideration of the residue.

Where two of the arbitrators in such case, are called and examined as witnesses touching the matters submitted to them, and their testimony is conflicting, a writing signed by them, and containing that part of the award sought to be rejected, after it has been submitted to them, is competent evidence, to be considered by the jury in determining the relative weight that ought to be given to the testimony of such witnesses.

APPEAL from the *Vigo* Circuit Court.

HANNA, J.—*Otis McCullough* sued *James McCullough* in an action of debt, under the old form of practice, on an award, &c. The declaration contains five counts.

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The first, is upon a bond in the sum of 2,000 dollars for the performance of an award.



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The second, is on an award.

The third, is for money had and received.

The fourth and fifth, are substantially the same as the second.

The award declared on is as follows:

"Whereas, *Otis* and *James McCullough* have, by their respective bonds, dated *March 3, 1843*, mutually submitted certain matters of difference between them, in the conditions of said bonds specified, to the award of *Benjamin Whitcomb*, *Otis M. Conkey*, and *William B. Warren*; and whereas, the said arbitrators have taken upon themselves the burden of the reference, and having heard and considered the proofs, &c., do make and publish this award, to-wit: We do award, first, that *James McCullough* is indebted to *Otis McCullough* in the sum of 1,196 dollars, as a just amount between the parties. Given under our hands and seals this 6th of *March, 1843*.

"*B. Whitcomb*, [seal.]

"*William B. Warren*, [seal.]

"*Otis M. Conkey*, [seal.]"

The defendant craved and obtained oyer of the award, and pleaded twenty-one pleas.

The instrument set out on oyer is precisely in the language above copied, with the following after the signature of the arbitrators, to-wit:

"We, the arbitrators, decide that should there ever be collected out of the hands of *Lindley* and *Williams*, on the transactions of a mistake, as contended for, that the same shall belong to *James McCullough*; and further, that the *S. B. Mullen* balance shall also be his, and 10 per cent. shall be calculated on all matters of difference of offset between the parties, from due up to this time, *March 6, 1843*.

"*William Warren*,

"*Otis M. Conkey*,

"*B. Whitcomb*."

The case turned upon the pleadings on the award.

The points included in the defenses set up were, so far as we need notice them—

1. No award.



2. That the latter branch of the instrument, set out on oyer, but not declared on, is a part of the award, and avoids the whole of it, because it is thereby rendered uncertain, and not final between the parties.

3. The arbitrators failed and refused to act upon all the claims of defendant, &c.

4. Set-off.

Among the various issues formed upon the pleas, it is only necessary for us to notice one, as upon that the case turns, in our opinion.

To the plea that all the instrument, set out on oyer, formed and constituted the award, &c., the plaintiff replied, admitting that, true it was, the award was made as set forth in that plea; but that the submission, in pursuance of which said award was made, is as follows: "The said *James McCullough* and *Otis McCullough* have this day agreed to submit to the award and umpirage of *Benjamin R. Whitcomb*, *Otis M. Conkey*, and *William B. Warren*, on the matters of difference between the said *Otis* and *James*, herein stated and referred to, to-wit, their adventure in the purchase and sales of pork, commencing in *December*, 1838, and all matters growing out of and connected with said adventure, as well as their respective private accounts between each other from that time to this date, which matters of difference they, the said arbitrators, or a majority thereof, shall decide thereon, and make their award thereon in writing." And the plaintiff avers that the following portion of the award pleaded, to-wit, "and that 10 per cent. shall be calculated on all matters of difference of offset between the parties from due up to this time, was not made of and concerning the matters submitted to their award, but was of matters not embraced, &c., and was not intended to, and does not affect, the award, &c.

The defendant took issue upon this replication.

There was a jury trial; verdict and judgment, over a motion for a new trial, for plaintiff for 1,806 dollars.

The evidence is in the record.

Two thousand dollars is the amount demanded in the

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commencement of the declaration; in the conclusion, the damages are laid at 1,000 dollars. It is insisted that the plaintiff could not recover in damages at all, and that the verdict is, therefore, defective, because the plaintiff was not entitled to more than claimed in the conclusion of his declaration. The record shows that, as to the pleadings, the case was fully and fairly before the jury on its merits, and that it would be a bar to another suit for the same cause of action. By § 85, R. S. 1843, p. 639, which was in force in 1851, when the cause was tried, the verdict and judgment was, as to that supposed defect, sufficient, whatever may have been the law upon that point previous to the enactment of that statute.

It is argued that the award is neither certain nor final, and therefore a nullity, because of the latter branch of the instrument set out on oyer, pleaded as the award, and admitted by the replication to have been made as such.

Now, it is true that an award must be certain, and this certainty must appear on its face. It must also be final as to all the matters submitted. And where a part of it relates to matters not submitted, the whole of it is void, unless the unauthorized part is distinguishable from the residue, and unless it appears that the consideration of the unauthorized part was so disconnected from the residue as to have no influence upon it. *Gibbs v. Berry*, 13 Ired. 388.—*Boynton v. Fry*, 33 Maine R. 216.—2 Phil. Ev. (10th ed.), p. 404, and authorities there cited.

It will be presumed that arbitrators have acted within the scope of their authority, unless the contrary appears. *Solomons v. M<sup>r</sup> Kinstry*, 13 Johns. 27.—*Waite v. Barry*, 12 Wend. 377. And as the parties were bound to bring before the arbitrators all matters in dispute which, by the agreement of submission, were to be passed upon by them, it will be presumed that they were before them, and passed upon. *Stipp v. Washington Hall Company*, 5 Blackf. 473.

A question is raised, and argued with much ability and ingenuity on each side, as to the ruling of the Court upon the admissibility of evidence.

It will be recollected that the paper produced on oyer,



although in two parts, or rather signed twice, was pleaded by the defendant, and set up as altogether forming the award. This was admitted in the next pleading of the plaintiff, to have been made as the award of the arbitrators; but it is then averred that a part of the instrument thus shown on oyer and pleaded, was of matters outside of those submitted to arbitration, but did not affect that part of the award which was of matters within the submission. Upon that replication, an issue of fact was formed. By tendering this issue, it devolved upon the plaintiff, before he could maintain his award, to establish three propositions, if the issue thus tendered was material; first, that the part of the award pointed out, was of matters not submitted to the arbitrators; and second, that such part could be so distinguished as to leave the other part, upon which the plaintiff relied, standing, after that should be rejected; and third, that the consideration of that portion of the award, thus to be rejected, had no influence on the valid part, because of the want of connection therewith. *Watson on Arb. and Awards*, 117, 118.—*Martin v. Hitchcock*, 12 Wend. 156.

We are of opinion that the issue was material; in other words, that, if it is true that the portion of the award pointed out, was of matters submitted, then it renders the whole award so uncertain—gave it such a want of finality—that it was not conclusive. but wholly inoperative.

The next question is, by what evidence was that issue to be determined?

Let us examine the award as shown by the pleadings to have been made. First, is awarded to the plaintiff a sum certain; second, to the defendant certain unsettled claims, or whatever might arise and be due to the firm therefrom; and third, that "10 per cent. shall be calculated on all matters of difference of offset between the parties from due up to this time." Now, most assuredly, there is such an entire absence of certainty in this latter clause, as at once vitiates the whole award, looking alone to the record then made. There is no amount stated upon which the 10 per cent. is to be cast, nor any date from which the

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calculation is to be made; nor is there the least indication of what that portion of the award was intended to apply to, other than that it was "difference of offset between the parties." This the law itself would have made as clear, for the presumption would be that it was of matters submitted. *Parsons v. Aldrich*, 6 N. H. R. 265.

The next question that arises, is upon the ruling of the Court in excluding certain matters offered in evidence by the defendant. Conceding, for the sake of the argument, that the inquiry, whether the clause in the award was of matters submitted to the arbitrators, was a question for the jury, as the inferior Court held by submitting that question to a jury, then, we are led to an examination of the testimony given, and that offered and rejected upon that issue.

The plaintiff proved, upon this point, by one of the arbitrators, that the 10 per cent. clause did not relate to matters submitted; that it had reference to matters of account between the parties prior to *December*, 1838; that an item of account of 234 dollars, 84 cents, was withdrawn from said arbitrators, to rebut, as stated by the parties, matters of account that existed prior to *December*, 1836; that witness signed three papers on the day of making the award; that the third was signed by one other of the arbitrators and the witness, about an hour after the award was signed, and was so drawn up and signed because counsel for defendant objected to the uncertainty of the language in relation to said 10 per cent., and was for the purpose of explaining the matters mentioned in the second part of the award; that the reason the second part of the award was made was, because the parties stated that there were accounts between them prior to *December*, 1838, and that as *Otis* had been allowed 10 per cent. on the matters awarded on, in making it up against *James*, they made this memorandum to show that 10 per cent. ought to be allowed *James* on any matters of offset he might have.

The defendant proved by another of the arbitrators, that a certain order drawn by the plaintiff on the defendant for 234 dollars, 84 cents, and dated *January* 1, 1840, was paid



by defendant at its date; that the order was before them, and he had no knowledge of its being withdrawn; that the 10 per cent. in the second part of the award, related to this order and other items of account which the defendant had against the plaintiff, which were submitted to the arbitrators, and upon which they made no award; that the paper shown to the witness, called the third paper, was signed by witness and the other arbitrator who had testified, about an hour after the award was made, more fully to explain matters stated in the award; that after refreshing his recollection by looking at the said paper, he could say that said item of 234 dollars, 84 cents was left out and not acted upon by said arbitrators.

The paper referred to by each of the arbitrators in his evidence, was offered in evidence by the defendant, the signatures thereto being admitted by the plaintiff.

On objection by plaintiff, the paper was excluded, it is as follows: "We, the arbitrators, decide that should there ever be anything collected from *Lindley and Williams* in the transaction with them, on the ground of a mistake, as contended for by *James McCullough*, that the same shall belong to *James McCullough*; and further, that the balance due from *S. B. Mullin* shall also be his, and also that 10 per cent. shall be allowed him on the amount of 234 dollars, 84 cents, from the first day of *January*, 1840, and which amount is to apply as a payment or set-off against the amount this day awarded in favor of *Otis* against *James McCullough*, *March 6*, 1843. *W. B. Warren*,

"*O. M. Conkey.*"

Ought the paper to have been admitted in evidence?

It is proper here to state, that the arbitrator who was introduced as a witness by the plaintiff, was recalled, and stated that a memorandum at the bottom of the second part of the award was written by him, as follows: "One of the matters thrown out in the above, was a private order of 234 dollars, 84 cents, and——" which words are erased by running a pen over them—but that witness could nevertheless still read them; and that he believed "the

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words erased stated the facts as he understood them at the time."

The award, memorandum, &c., were made *March 6, 1843*. The trial was in *September, 1851*.

It is now objected that the writing alluded to by the witnesses as the "third paper," ought not to have been admitted, because it was a mere nullity, binding nobody, and because it was not placed in the hands of both the persons who signed it, and their attention particularly called to it whilst they were testifying; nor did they deny its execution, or its correctness. The argument in support of this position is, that the most it could have been received for would have been to contradict a witness in his evidence, by showing, by this paper, that he had, at another time and place made a different statement, and, therefore, his attention should specially have been called to the contents of the paper; and because it contains a mere void decision, and no fact at all.

Upon an analogous question, it is laid down in 1 Greenl. Ev., § 463, that "The contents of every written paper, according to the ordinary and well established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence. But it is not required that the whole paper should be shown to the witness. Two or three lines only of it may be shown to a witness, &c.  
\* \* \* \* If he admits the letter to be his writing, he cannot be asked whether statements, such as the counsel may suggest, are contained in it, but the whole letter itself must be read." This authority is based upon the leading case upon that point. *The Queen's Case*, 2 Brod. and Bing. 286, where see responses of judges of *England* upon interrogatories put by the House of Lords. It is further stated that "According to the ordinary rule of proceeding in such cases, the letter is to be read as the evidence of the cross-examining counsel, in his turn, when he shall have opened his case." *Ibid.*

From this, we are led to believe that the principal reason for placing the writing in the hands and subjecting it to the examination of the witness, is to ascertain whether



he executed it, and give him an opportunity to note its contents, that he may be the better prepared, when called upon, to offer explanations of discrepancies, if any exist, between its contents and his evidence.

In the case at bar, the witness, in whose hands it does not directly appear that whilst he was testifying, the writing was placed, had, before the paper was offered in evidence, entered into an explanation of the reason why, and the purpose for which, the paper was written and signed, as well as the circumstances under which it was done. We think it sufficiently appears he was apprised of its contents. There was no necessity for calling his attention to it, to prove his signature thereto. That was admitted by the parties.

In *Crowley v. Page*, 7 Carr. and Payne, 789, 32 E. C. L. 738, the suit was for a failure to deliver hay according to a contract. Defense, offer to deliver of the quality required. *Beard*, a witness, was called, who stated that the hay which was offered was not of good quality, &c. On being shown a paper, on cross-examination, he said, "I signed this paper."

In the argument, *Talfourd*, sergeant, for defendant, was proceeding to read the paper, when objection was made because "*Beard* did not deny it." PARKE, B., "If the witness has said at another time that the hay was good, you may give evidence that he said so; and, if it was by writing, you may read the document. *Beard* said, when the paper was shown to him, that the signature was his. That entitles the other side to read it. If it contradicts his evidence, he may be called back to explain it."

In *Leavey v. Dearbourn*, 19 N. Hamp. 357, it is said that "The memorandum made at the time of the transaction, for the purpose of stating it truly and circumstantially, becomes evidence, it having been first shown, by other proper proof, that it was so made."

In *Haven v. Wendell*, 11 *id.* 120, a witness had, after a conversation with one of the defendants, made a memorandum in writing thereof, and gave it to the plaintiff. The fact that he held a conversation, and that he made the writ-

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ing, he recollected, but not the particulars of such conversation. Upon being shown a paper, he recognized it as the memorandum he had made, and stated that if he had been called on soon afterwards, he would, he had no doubt, have testified to the statement of facts it contained. The paper was read. It was held that "It is not disputed that the witness might have been admitted to testify to these facts as existing in his recollection. If the paper be authentic, his record of the fact, made at the time when he was much less liable to mistake, is much better than his recollection of the facts so long afterwards."

We are of opinion that, under the circumstances of this case, the ruling of the Court, in excluding the evidence offered, was erroneous. It tended directly to elucidate the doubt which was cast around the question whether the "10 per cent. clause" had reference to matters submitted. If it was not evidence of the substantive facts stated in it, which we need not decide, it was clearly such as might be considered by the jury, in determining the relative value of the testimony, and the weight that ought to be given to each witness who had testified upon the point, upon which they had made a statement, whilst the facts from which they had written that statement, were yet fresh in their memory. It is not to be disguised that the evidence of the two arbitrators, whose testimony is above referred to, was contradictory in several essential particulars. One testified that the clause of the award under consideration, was of matters not submitted—the other, that it was. One that the item of 234 dollars, 84 cents, was on an account—the other, that it was on an order. One that the item was withdrawn—the other, that it was not, nor was it acted upon by the arbitrators. These contradictions, to say the least of them, show that either there was a misunderstanding of the facts, as they existed at the time of the transaction, or else that the memory of one was more to be relied on than that of the other. They had both, at the time, signed this statement in regard to the very point upon which there was, near nine years afterwards, such a



variance in their recollections. The jury should have heard it. May Term,  
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*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

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DAVISON, J., dissents.

A. Kinney, S. B. Gookins, J. P. Usher, and D. W. Voorhees, for the appellant.

D. McDonald, C. W. Barbour, and A. G. Porter, for the appellee.

19	497
124	540
12	487
133	98
12	497
159	588

### VOTAW v. THE STATE.

In an action upon a forfeited recognizance, a copy of the recognizance must be filed with the complaint, and a forfeiture is necessary to the maintenance of the suit; but the statute (§ 78, 2 R. S. p. 44) does not require that the minutes of the Court showing the forfeiture, nor a copy thereof, should be filed with the complaint. The recognizance is a written instrument, within the meaning of the statute, while the judgment of forfeiture thereof is not.

Complaint upon a forfeited recognizance. The substance of the second paragraph of the answer was, that the amount of the bail was not specified in, nor indorsed upon, the warrant of commitment. It did not deny that the amount had been fixed by the proper authority. Reply, showing that the amount of bail had been fixed by the order of the Court.

*Held*, 1. That the reply was good if the answer was good; that if the answer was good, it was because it is to be inferred from it that the amount of bail had not been fixed by competent authority; and the reply meets that inference.

2. That if it could not be inferred from the facts set up in the answer, that the amount of bail had not been fixed by competent authority, then the facts were wholly immaterial, and an issue upon them would have been immaterial.

3. That it is not error to refuse to reject a reply to an immaterial answer, although the reply may not be responsive to it.

4. Where the amount of bail has been properly fixed, a recognizance is not void because the amount is not indorsed upon the warrant of commitment.

If in an action upon a forfeited recognizance, the answer admits the execution of the recognizance, its admission in evidence is not an error of which the defendant can complain.

Action upon a forfeited recognizance. The state offered in evidence the following order made by the Court at the time the indictment was found: "Ordered, that on all bills of indictment returned by the grand jury at the pre-



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sent term of this Court for perjury, the defendant is required to enter into recognizance in the sum of 500 dollars, with surety in the like sum; for 'passingn' of counterfeit apparatus, in the sum of 1,000 dollars, with surety in the like sum; for aiding in the possession of counterfeiting apparatus, forgery, and grand larceny, all in the sum of 500 dollars," &c. Parol testimony was offered to show that "passingn" was intended for the word "possession," and the record was amended accordingly. Parol testimony was received that the order was intended to embrace the cause in which the recognizance was taken.

*Held*, 1. That the order was sufficient to sustain a finding against the defendant, independently of the parol testimony.

2. That the order was made in compliance with § 30, 2 R. S. p. 356, and sufficiently fixes the amount of bail in the present case.

3. That the words "passingn of counterfeit apparatus," sufficiently indicated the crime for which the indictment was found, and authorized the sheriff to take the recognizance; and the recognizance having been taken subsequently to the making of the order, no proof was necessary to show that the particular case was intended to be embraced in the order. WORDEN, J., dissented.

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APPEAL from the *Jay* Circuit Court.

WORDEN, J.—Complaint by the state against *Votaw*, on a recognizance entered into by him and one *Asher R. Bowman*, on the 18th of *April*, 1856, conditioned for the appearance of *Bowman* before the *Jay* Circuit Court, at the next term thereof, to answer an indictment for having counterfeiting apparatus in his possession. The complaint avers that the condition of the recognizance was forfeited in this, that said *Asher R. Bowman* did not appear, &c., to answer said charge at the time aforesaid, but was wholly in default, although he was by the sheriff, &c., three times audibly called at the court-house, to appear in discharge of his recognizance, as was also the said *Quinby B. Votaw* called by said sheriff, and required to bring the body of said *Bowman* in discharge, &c., all which they refused to do, as appears of record, wherefore, &c. A copy of the recognizance is filed with the complaint, but no copy of the entry on the order book of the Court showing the default, is filed.

*Votaw* answered—

1. That at the time of entering into the recognizance, the *Jay* Circuit Court had not made an order fixing the amount in which said *Bowman* was to be held to bail on said indictment for having counterfeiting apparatus in his



possession; nor had the clerk indorsed any amount of bail on the warrant, by which *Bowman* was arrested, as having been ordered by said Court; nor had any judge of a Circuit Court, or Court of Common Pleas indorsed any amount of bail to be required of said *Bowman*, nor had the clerk fixed any amount of bail, or indorsed any amount of bail on said warrant; by reason whereof, the sheriff had no authority to take the recognizance; wherefore, &c.

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2. That at the time of the making of the recognizance, *Bowman* had been and was committed to the jail of the county for want of bail, and the amount of bail was not specified in the warrant of commitment, nor indorsed thereon; wherefore the sheriff had no authority, &c.

3. That no record or copy thereof, showing that *Bowman* did not appear according to the condition of the recognizance, is filed with the complaint.

4. That *Bowman* did appear according to the condition of the recognizance, &c.

To the first paragraph of the answer the plaintiff replied in denial, averring that during the spring term, 1856, of the *Jay* Circuit Court, and while it was in session, *Bowman* was arrested by the sheriff under the authority of a bench warrant issued from said Court, and brought before the Court, and that the Court, in his presence, ordered and directed that he enter into a recognizance in the sum of 1,000 dollars, with surety in the like sum, and that in default thereof he be committed to the jail, &c.; that for want of bail *Bowman* was committed, and that afterwards, to-wit, on, &c., the sheriff, by virtue of the authority aforesaid, took and received the recognizance, &c.

Reply to the second paragraph, that the sheriff was legally authorized to take the recognizance, and did take the same, under the authority and order of the *Jay* Circuit Court, made in open Court, in the presence of *Bowman* and his counsel, as is particularly set forth in the preceding replication; wherefore, &c.

A motion was made and overruled, to strike out the replications, severally, to the first and second paragraphs of the answer, on the ground that they were not responsive



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1859. and were not replies thereto.

VOTAW A demurrer was sustained to the third paragraph, and  
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The cause was tried by the Court, and there was a finding and judgment for the plaintiff, a motion for a new trial being overruled.

The first error assigned is the ruling of the Court on the demurrer to the third paragraph of the answer.

It is insisted that the complaint is defective in not setting out or containing a copy of the order of the Court showing the recognizance to have been forfeited. Section 78 of the code is relied upon to sustain this position. That section provides that "When any pleading is founded on a written instrument or on account, the original or a copy thereof, must be filed with the pleading."

The action is founded on the recognizance (a copy of which is filed), and although a forfeiture is necessary to the maintenance of the suit, yet the section above quoted does not, in our opinion, require that the minutes of the Court showing the forfeiture, nor a copy thereof, should be filed with the pleading. The recognizance is, while the judgment of forfeiture thereof is not, "a written instrument," within the meaning of the statute.

The second error assigned is, that the Court erred in overruling the motion to set aside the replications to the first and second paragraphs of the answer.

The point is abandoned as to the reply to the first paragraph, but insisted on as to the other. It is insisted that the reply to the second paragraph of the answer, is not "responsive" to it, and should, therefore, have been rejected. We think there was no error in the ruling of the Court in this respect.

The second paragraph of the answer set up a state of facts that perhaps would be *prima facie* a good defense, though this point is doubtful. The substance of this paragraph is, that the amount of bail was not specified in, nor indorsed upon, the warrant of commitment. The paragraph does not deny that the amount of bail had been fixed



by the proper authority, although it was not specified in, nor indorsed upon, the warrant of commitment. Where the amount of bail has been properly fixed, a recognizance is not void because the amount is not indorsed upon the warrant. *Trimble v. The State*, 3 Ind. R. 151. If the answer in question is good, it is because it is to be inferred from what is therein stated, that the amount of bail had not been properly fixed by competent authority. The replication meets that inference, and shows that the amount of bail had been fixed by the order of the Court, and we think it is a proper reply, and good if the answer be good.

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If it cannot be inferred from the facts set up in the answer, that the amount of bail had not been fixed by competent authority, then the facts set up are wholly immaterial, and had an issue been directly taken thereon, it would have been an immaterial issue. It is not error, in our opinion, to refuse to reject a replication to an immaterial answer, although the replication may not be responsive to it. Of this ruling the appellant cannot complain, as it did him no harm, and did not, in any manner, affect his legal rights.

On the trial, the state offered and gave in evidence the recognizance in question, which was objected to as being irrelevant to the issues. It may not have been at all necessary to offer the recognizance in evidence, as the answer did not deny the execution of the same, but this did not prejudice the rights of the defendants. If the execution of the recognizance was admitted by the answer of the defendant, it is difficult to see how his rights were, in this manner, injuriously affected. It was only proving what was already admitted by the pleadings, and the admission of the evidence was not an error of which the appellant can complain.

The remaining errors relate to the ruling of the Court upon objections to the introduction of testimony, and on a motion for a new trial.

The state offered in evidence the following order made by the Court, at the term at which the indictment was found, and entered on the order book of the Court, viz.:



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"Ordered, that on all bills of indictment returned by the grand jury at the present term of this Court for perjury, the defendant is required to enter into recognizance in the sum of 500 dollars, with surety in the like sum; for 'passingn' of counterfeit apparatus, in the sum of 1,000 dollars, with surety in the like sum; for aiding in the possession of counterfeiting apparatus, forgery, and grand larceny, all in the sum of 500 dollars, each with surety in the like sum; for petit larceny, in the sum of 200 dollars, with surety in the like sum; and for obtaining goods by false pretenses, in the sum of 300 dollars, with surety in the like sum; and in all others, in the sum of 500 dollars."

There was some parol testimony offered and received, showing that the word "passingn" was intended for "possession," and the record was amended accordingly. There was also parol testimony offered and received, showing that the general order above set out was intended to embrace the case in question.

We shall not discuss the propriety of receiving the parol testimony, as it is the opinion of a majority of the Court, that the order above set out was sufficient to sustain the finding of the Court, independently of the parol testimony. The order was made in compliance with § 30, 2 R. S. p. 356, and sufficiently fixes the amount of bail in the present case.

A majority of the Court are of opinion that the words "passingn of counterfeit apparatus" sufficiently indicate and point out the crime for which *Bowman* was indicted, to authorize the sheriff to take the recognizance in question. And the recognizance having been taken subsequently to the order being made, no proof was necessary to show that the particular case was intended to be embraced in the order.

The writer hereof is of opinion that the language employed in the order, viz.: "passingn of counterfeit apparatus," even were it to be read "possession of counterfeit apparatus," is too vague and indefinite to indicate any crime known to the law; and hence, that the sheriff had



no authority to take the recognizance; but the majority of the Court think otherwise.

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*Per Curiam*.—The judgment is affirmed with costs.  
*J. Smith*, for the appellant.

HERBERT  
v.  
STANFORD.

### HERBERT v. STANFORD.

APPEAL from the *Lagrange* Court of Common Pleas. *Wednesday, June 15.*

PERKINS, J.—In *June*, 1857, *James Herbert* contracted to convey to *Bradford Stanford*, a tract of land in *Indiana*, on the payment, by the latter to the former, of 800 dollars, in the manner and at the time specified. The contract of sale was effected by *Herbert* through fraud; and he received upon it, a payment in certain specific articles, at a price agreed upon by the parties. *Stanford* soon afterwards discovered the fraud, failed to take possession of the land, and sued to rescind the contract and recover back the amount he had paid. He recovered.

It is objected that he could not maintain this suit without first giving notice of his intention to rescind. This is a mistake. The cases of *McQueen v. The State Bank*, 2 Ind. R. 413, and *Pope v. Wray*, 4 M. and W. 451, are in point.

Had the contract been executed in whole or in part by *Herbert*—that is, had *Stanford* received any benefit or advantage from the contract, as a conveyance of the whole or part of the land, or rents or profits from the use and occupation of it, he might have been under the necessity of returning or offering to return, what he had received, and demanding back what he had paid. *Gatling v. Newell*, 9 Ind. R. 572. But having himself received nothing, he had nothing to return, and might rescind the contract at once, by bringing an action to recover back what he had paid, as for money obtained from him by fraud. *McQueen v. The State Bank*, and *Pope v. Wray*, *supra*.



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BUTLER  
v.  
JAFFRAY.

The defendant asked leave to prove that the specific articles paid on the contract were not worth the stipulated price. It was not proposed to prove that any fraud or misrepresentation had been made concerning them, but simply that the party, with full opportunity of inspecting and judging, had voluntarily fixed the price he would give for them at more than they were worth.

Had the articles been delivered without a stipulated price, or had there been fraud or warranty, the evidence offered might have been proper. But as, in the absence of these, the parties had agreed upon the value of the articles, less than the sum named in that agreement, could not be the proper measure of the value in this suit against the defrauding party. The evidence offered was properly rejected. *Cravens v. Kiser*, 4 Ind. R. 512.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*A. Ellison*, for the appellant.

*J. M. Flagg*, for the appellee.

#### BUTLER and Others v. JAFFRAY and Others.

*A.* placed notes on different persons amounting in the aggregate to the sum of 2,666 dollars, 85 cents, in the hands of *B.* to be applied by him in payment *pro rata* of certain debts of *A.*, amounting in all to 4,430 dollars, 67 cents, provided each creditor upon the receipt of his *pro rata* share of the proceeds of the notes, would release his entire claim against *A.*; but subject to express instructions to the effect that, if *C.*, who was responsible for 900 dollars, upon judgments against *A.*, should be compelled to pay that sum, then he should be reimbursed from the proceeds of the notes, before any part thereof should be applied upon the other debts of *A.* The only written evidence of this arrangement was contained in the receipt given by *B.* to *A.* for the notes.

*Held*, 1. That this arrangement did not divest *A.* of his property in the notes.

2. That the arrangement, regarded as an assignment was void; because it required each creditor, upon payment of his *pro rata* share of the proceeds of the notes, to release his entire debt.

12	604
197	304
12	604
153	7



Choses in action in the hands of a third person belonging to a judgment-debtor, may be subjected to the payment of the judgment, upon "proceedings supplementary to execution," under 2 R. S. p. 152, instituted by the judgment-plaintiff; but other creditors of such debtor, have no right to make themselves parties to such proceedings, and demand a *pro rata* distribution of the proceeds of such choses in action.

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BUTLER  
v.  
JAFFRAY.

### APPEAL from the *Jefferson* Circuit Court.

Wednesday,  
June 15.

WORDEN, J.—This was a proceeding by the appellees against *Brown, Baily, French, and Sullivan*, under the provisions of the statute regulating "proceedings supplementary to execution." 2 R. S. p. 152. It appears by the complaint and affidavit filed, that on the 4th of *April*, 1850, the plaintiffs recovered a judgment in the *Jefferson* Circuit Court, against the defendants *Brown, Baily, and French*, for the sum of 298 dollars, 44 cents, and costs, on which an execution was afterwards issued, and returned "no property found." It is further alleged, that after the recovery of the judgment, *Brown, Baily, and French* made an assignment of choses in action to *Jeremiah Sullivan*, in trust to convert the same into money, and pay the proceeds to such only of their creditors as should release them from any residue of their debts beyond what the choses so assigned would pay; that the assignment is fraudulent and void and made to defraud, hinder, and delay the plaintiffs in the collection of their debt; that *Sullivan* accepted the assignment, and under it has received large sums of money, which he holds, and refuses to pay any part thereof to the plaintiffs.

Prayer, that *Sullivan* be required to answer, &c.; that the assignment be declared fraudulent and void, and that the money in his hands be applied to the plaintiffs' judgment.

*Sullivan* answered that on the 31st of *January*, 1851, *Brown, Baily & Co.* placed in his hands notes held by them on various persons, amounting, according to the list set out, to the sum of 2,666 dollars, 35 cents; that they, at the same time, made out a list of their creditors, with the amounts owing to each, a copy of which list is set out, including the plaintiffs, amounting, besides interest, to the sum of 4,430 dollars, 67 cents, and also a claim in favor of



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*Rosette and Troutman* for 1,235 dollars, 82 cents, secured by a mortgage; that the object for which the notes were placed in his hands is fully expressed in a receipt then executed by him to *Brown, Baily & Co.*, as follows, viz.: "The foregoing list of notes marked No. 2 (the notes thus placed in the hands of *Sullivan*), is this day deposited with me by *Brown, Baily & Co.*, late of *Madison, Indiana*, to be collected, or otherwise used, for the payment of their debts, to their creditors named in list No. 1, on the first page of this paper (the list of creditors thus furnished as above stated), said *Rosette and Troutman* excepted, at such per cent. as the proceeds will pay; and to obtain from said creditors, on the payment of such per cent., acquittances and discharges from their said debts; but with this express direction and instruction, that *Robert Baily*, of *Jefferson county, Indiana*, is held responsible, by certain judgment-creditors of said *Brown, Baily & Co.*, for the sum of 900 dollars. Now, if said *Robert Baily* shall be made liable, in his person or property (said property either really or nominally held by him), for the payment of said sum of money, then 900 dollars, the proceeds of said notes are to be first paid to him, and the residue divided, *pro rata*, among the creditors in said list No. 1, this day furnished me by said *Brown, Baily & Co.*, except said *Rosette and Troutman*; but if all of said creditors (said *Rosette and Troutman* not included, they being secured by mortgage,) will agree to and receive a *pro rata* distribution of said notes, or the proceeds of them, and discharge the said *Brown, Baily & Co.* from any further liability to them, then nothing is to be paid said *Robert Baily*. [Signed] *Jeremiah Sullivan*.

"*Madison, January 31, 1851.*"

He further alleges in his answer that he forthwith gave notice of the transaction by mail to all of said creditors. That he has collected of the claims 1,218 dollars, and the balance remains uncollected. That some of the creditors (naming them) have acceded to the arrangement, to whom he has paid their *per centum* out of the 1,218 dollars. He insists on distributing the fund equally among the creditors named in the list, and prays that they be made parties, and



that, upon the final hearing, the Court will make such distribution, &c.

At this stage of the proceedings, *Edwin T. Butler* and several other creditors of *Brown, Baily & Co.*, filed their petitions, supported by affidavit, to be made parties plaintiff to the suit, and for a *pro rata* share of the fund in the hands of *Sullivan*; but their applications were rejected, and they took exceptions. These applications were rejected, as the record informs us, "for want of conformity to the statute on which the proceeding is founded, and because no provision is made for other creditors coming in under the proceeding of the plaintiffs."

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On the hearing it was found and adjudged by the Court that the assignment was fraudulent and void as to the creditors of *Brown, Baily & Co.*, and that the money admitted to be in the hands of *Sullivan* was the money of *Brown, Baily & Co.*, and ought to be applied to the payment of the plaintiffs' debt, and it was ordered and adjudged accordingly.

Exceptions were taken so as to duly present the points relied upon to reverse the case.

The appellants insist that the other creditors of *Brown, Baily & Co.* should have been made parties, and that the funds in the hands of *Sullivan* should have been distributed *pro rata* amongst them as well as the plaintiffs.

The statute provides, that after the issuing or return of an execution against the property of the judgment-debtor, and upon an affidavit that any person, &c., has property of such judgment-debtor, or is indebted to him in any amount, &c., such person, &c., may be required to appear and answer concerning the same; that witnesses may be required to appear and testify; that either party may examine the other as a witness; and that, upon the hearing, the Court may order any property of the judgment-debtor, not exempt from execution, in the hands either of himself or any other person, or any debt due to the judgment-debtor, to be applied to the satisfaction of the judgment. 2 R. S. p. 153, §§ 522, 523, 524.

The proceedings authorized by this statute are, per-



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haps, a convenient substitute for an ordinary creditor's bill, and they furnish him a remedy by way of subjecting a chose in action of the debtor to the payment of his judgment, which did not exist before the passage of the statute. *Shaw v. Aveline*, 5 Ind. R. 380. This statute authorizes the proceedings and judgment below, unless for some reason, the other creditors of the judgment-debtors had a right to participate in the fund *pro rata* with the plaintiffs.

If the transaction between the judgment-debtors and *Sullivan* be deemed a valid and *bona fide* assignment, then, perhaps, the other creditors, for whose benefit the assignment was made, should have been made parties. At most, the plaintiffs could have recovered their share, only, of the funds in the hands of the trustee.

But it is doubtful whether the transaction amounted to an assignment of the claims thus placed in the hands of *Mr. Sullivan*. The notes were placed in his hands, with directions as to the manner in which the proceeds should be applied; but from the whole transaction it is by no means clear that any title passed to him, either legally or equitably, for the benefit of the creditors. It is not easy to perceive any good reason why the instructions, as to the application of the notes, or the proceeds, might not have been recalled by *Brown, Baily & Co.*, and the avails applied to a different purpose, or the amount received by *Sullivan*, except so far as he had applied it in pursuance of the instructions, recovered of him by *Brown, Baily & Co.* An order to an agent for the payment of money, or the delivery of a negotiable instrument to a third person in payment of a debt, is essentially revocable. *Brind v. Hampshire*, 1 M. and W. 305, as cited in *Lead. Cases Eq.*, vol. 2, part 2, 233. *Vide*, also, *Clayton v. Fawcett*, 2 Leigh, 19; *Thayer v. Havener*, 6 Greenl. 212; *Dickinson v. Phillips*, 1 Barb. (S. C. R.) 454.

It does not appear that *Mr. Sullivan* was the agent or attorney for the creditors to whom he was instructed to pay the proceeds, and, therefore, the case does not come within the principle decided in *Alexander v. Adams*, 1 Strob. 47, where it was held that if one place a note in the hands of



an attorney for collection, instructing him to pay the proceeds in satisfaction of a debt due by him to another, that other being also a client of the same attorney, this is an actual appropriation of the fund which places it beyond the future control of the party so instructing, and which he cannot revoke by an after assignment. The Court say: "If Mr. *Wright* had been the attorney of *Crockett* alone, what passed between them might be a mere direction of *Crockett* to his agent as to the application of the money, which would be revocable. But Mr. *Wright* was the attorney of *Barnett* also, and the appropriation was made to him in that capacity. It was, therefore, not a direction merely, but an actual appropriation of the funds, or a verbal assignment, which placed it beyond the subsequent control of *Crockett*, and which he could not revoke by his subsequent assignment to the plaintiff."

If, in the case at bar, there was no assignment of the claims, so as to divest *Brown, Baily & Co.* of their control over them, and which would amount to an actual appropriation of them to the payment of the specified debts, then it follows that the money in the hands of *Sullivan* was the money of *Brown, Baily & Co.*, and subject to the payment of the plaintiffs' judgment. In such case, there can be no pretense that other creditors should have the right to come in under this proceeding, and share the money with the plaintiffs.

But if the transaction be deemed to be an assignment, we think it void for the reasons given in *Henderson v. Bliss*, 8 Ind. R. 100. The receipt given by Mr. *Sullivan* to his assignors contains the terms of the assignment, and from that we understand that the creditors provided for were not to be paid any *per centum*, unless they would release the balance of their debts, and there was no time fixed within which such releases were to be executed, neither does it appear that the assignment embraced all of the joint property of the debtors, as well as the separate property of each.

The assignment being void, the question arises whether the plaintiffs, having instituted their proceedings to reach

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the funds in the hands of Mr. *Sullivan*, are entitled to have their judgment fully satisfied (the fund being sufficient), or whether other creditors can come in and share it with them.

It is held, that when a creditor goes into equity to seek the benefit of an assignment, he must either make the other creditors parties, or he must file the bill in behalf of others who may choose to come in, as well as himself; but when he desires to set aside an assignment, he files a bill in his own name against the assignor and assignee alone, without making the other creditors parties. *Wakeman v. Grover*, 4 Paige, 24.—*Russell v. Lasher*, 4 Barb. (S. C. R.) 233.

The plaintiffs acquired no lien on the fund in the hands of Mr. *Sullivan*, by virtue of their judgment or execution.

It is settled by the current of authorities, that a creditor may file a bill in his own name for his sole benefit, or in behalf of himself and all others who may be entitled and may choose to come in; if he proceeds on his own account alone, and no lien has been gained or can be acquired at law, he acquires a specific lien by filing the bill, and is entitled to priority over other creditors. 1 H. and W. Am. Lead. Cases, p. 85, and authorities there cited.

In *Pierce v. Weed*, 9 Cow. 728, the rule is stated in the following terms: "Where the property has not been levied on by the execution, or where it is of such a nature that it never could have been levied upon or reached by an execution at law, the return of the execution unsatisfied will not, of itself, give the creditor a specific lien upon the trust property, or chuses in action of the debtor. He must follow up his execution by the commencement of a suit in equity, or, at least, he must give notice of his claim, and of his intention to pursue the trust fund, or do some decisive act, showing such intent, before he can be considered as having a specific lien. The creditors whose legal diligence has continued to pursue the defendants' property into this Court, are entitled to a preference as the reward of their diligence."

So in *The United States Bank v. Burke*, 4 Blackf. 141,



it was held that "such a bill, the instant it is filed, becomes a specific lien; and the creditor who first files his bill, obtains a priority and preference over the other creditors, as the reward of his legal diligence." This last case has been virtually overruled, so far as the doctrine therein stated is held applicable to the case of a deceased debtor, by the case of *Barton v. Bryant*, 2 Ind. R. 189, followed in *McNaughtin v. Lamb*, *id.* 642.

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v.  
JAFFRAY.

In such case, the administrator should be made a party, that the property when recovered may be received by him, and go in a course of administration. A single creditor, or a few creditors of the deceased debtor, cannot, by suit in chancery, have the property of the estate sold for the payment of their own demands, without any inquiry as to the rights of other creditors. *Vide* 1 Am. Lead. Cas. 74.

But in the case at bar, the debtors were not deceased; and in analogy to the principles already stated, we are of opinion that the plaintiffs, by instituting their proceedings under the statute to reach the funds in the hands of Mr. *Sullivan*, acquired a lien thereon, and were entitled to have their judgment first satisfied, and, therefore, that the ruling of the Court was correct. If, after the payment of the plaintiffs' judgment, anything remained in the hands of Mr. *Sullivan*, the other creditors, by instituting the proper proceedings, could reach it; but that is no reason that they should be made parties to this proceeding.

It may be remarked, in passing, that when an assignment is set aside for fraud, the assignee is not answerable for payments made under it to *bona fide* creditors, before the filing of the bill. 1 Am. Lead. Cas. 101.

In this case, there seems to have been enough undisposed of in the hands of the assignee to pay the plaintiffs' claim.

With this view of the case, we have not deemed it necessary to inquire whether the other creditors seeking to become parties and share the fund, brought themselves within the requirements of the statute; nor do we decide whether, in any case, such creditors could come in under



May Term, 1859. the provisions of the statute, and make themselves parties to the proceeding.

CLEVELAND  
v.  
HUGHES. *Per Curiam*.—The judgment is affirmed with costs.  
S. C. Stevens, for the appellants.  
C. E. Walker, for the appellees.

### CLEVELAND and Another v. HUGHES.

A. brought suit against B., who filed an answer with interrogatories, which, without an affidavit of their materiality, he required the plaintiff to answer. The Court granted a rule upon A. for an answer to the interrogatories. C., the attorney of A., filed an affidavit that his client lived four miles from the Court, and knew nothing of the interrogatories; and upon this affidavit moved the Court to discharge the rule. B. at the same time moved for an attachment against A. for failing to answer the interrogatories. The Court discharged the rule, and refused the attachment.

*Held*, that this ruling was, under the circumstances, correct, with reference to the provisions of the act of 1855, p. 59.

Wednesday,  
June 15.

APPEAL from the *Hendricks* Court of Common Pleas.

PERKINS, J.—Suit upon a promissory note. Answer, in several paragraphs, setting up fraud, usury, failure of consideration, &c.

The defendants appended to their answer several interrogatories which they called upon the plaintiff to respond to under oath.

The rule for answer was taken on the eighth day of the term. The answer and interrogatories were filed on the ninth day, and a rule for an answer to the interrogatories was taken.

Afterwards, on the latter day, the plaintiff's attorney filed the following affidavit:

"State of *Indiana*, *Hendricks* county, ss. Personally appeared in open Court, *Leander M. Campbell*, who, being duly sworn, says, that the above-named plaintiff, *William A. Hughes*, is not present in Court, nor in the town of *Danville* [that in which the Court was sitting], but, as



affiant is informed and believes, lives about four or five miles from town, and has no knowledge of the filing and propounding of said interrogatories to him by the defendants.

*L. M. Campbell.*

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HUGHES.

"Subscribed and sworn to in open Court, *February 18, 1858.*

*John Irons, clerk."*

On this affidavit, the plaintiff's attorney moved the Court to discharge the rule for answer to the interrogatories. The defendants interposed a motion for an attachment against the plaintiff for failing to make such answer.

The Court refused the attachment, and discharged the rule for an answer. Exceptions were taken.

The plaintiff replied in denial of the answer. The cause was tried, and judgment was rendered for the plaintiff for the amount of the note.

The only question in the cause presented to this Court by the record, is upon the ruling of the Court below discharging the defendants from answering the interrogatories.

The statute on the subject provides (Laws 1855, p 59), that "Either party may propound interrogatories to be filed with the pleadings relevant to the matter in controversy, and require the opposite party to answer the same under oath. All interrogatories must be answered within the time limited, positively, and without evasion, and the Court may enforce the answer by attachment or otherwise, and the party may, in addition thereto, set forth in his answer all relative matter in avoidance; the answer to the interrogatories may be used or not on the trial, at the option of the party requiring it; *provided*, that, in the absence of such opposite party, the filing of the interrogatories shall not work a continuance of the cause, unless it be shown to the Court, by affidavit, that the party who files such interrogatories expects to elicit facts by the answer material to him on the trial; that he believes such facts to be true; that he cannot prove the same by any witness; and that he files the interrogatories not for delay merely, but to obtain substantial justice at the trial."



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Under this statute, a party present in Court, or conveniently near for receiving notice thereof, when the interrogatories are filed, must answer such as are proper, though they are not supported by affidavit, if a rule for answer be taken upon him, otherwise not. *Key v. Robinson*, 8 Ind. R. 368. But if they appear upon their face to be mere sham pleading, they need not be answered under a rule, but may be stricken out on motion. *Ibid*.

Where the party against whom interrogatories are filed is absent, or concealed, so that delay for an answer is necessary, the party filing the interrogatories must accompany them by an affidavit, as required by statute, or the cause will take its regular course as though they had not been filed. *Barnard v. Flinn*, *id.* 204. This practice is necessary to prevent abuse of the privilege. *Lent v. Knott*, 7 *id.* 230. And it may be here observed that where a continuance is granted for answer, a bond, as in case of an injunction, will not generally be required. *Barnard v. Flinn*, *supra*.

Where the interrogatories are vague, if the opposite party, instead of moving to strike them out, or to have them rendered more certain, submit to answer, the answer will not be required to be more definite than fairly to respond to the interrogatory as propounded. *Deming v. Patterson*, 10 Ind. R. 251.

And if the pleading sought to be supported by evidence elicited by interrogatories be insufficient, an exception to the interrogatories will be sustained for that cause. Ind. Dig. 687.

Where proper interrogatories, in a proper case, are filed, and the party to respond to them is absent, a continuance, to another day in term, or to another term, as the case may require, may be obtained upon a proper affidavit. But the mere failure to answer interrogatories, by a party not shown to be absent, is not a sufficient ground for a continuance to another term. An attachment should be obtained against him to compel an answer; and the party, in default in answering, will not be allowed to object to the delay occasioned by his own default, because an at-



tachment was not, at an earlier day in the cause, obtained against him. In such a case, on obtaining the attachment, and filing an affidavit of the materiality and necessity of an answer, a continuance, for a longer or shorter time, as may be necessary, may be obtained. *Hubler v. Pullen*, 9 Ind. R. 273.

In the case at bar, the plaintiff was shown to be absent; the interrogatories appeared on their face to be sham pleading, and were not supported by affidavit. The cause came to trial in its regular order, and no error appears in refusing the continuance, even for a day.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*C. C. Nave* and *J. Witherow*, for the appellants.

*L. M. Campbell*, *H. C. Newcomb*, and *J. S. Tarkington*, for the appellee.

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WOOD  
v.  
MEARS.

### WOOD v. MEARS.

Complaint alleging that on, &c., at, &c., the defendant wrongfully, &c., laid a pile of dirt and gravel in *East* street, between *Washington* and *Market* streets, in the city of *Indianapolis*, &c., which said *East* street was then and there a public highway, &c., and the plaintiff, in carefully driving along said street, between the streets aforesaid, and being then and there ignorant of the existence of said pile of dirt and gravel, the evening being dark, ran against and upon the same, whereby his gray mare, of the value, &c., was then and there thrown down and fatally injured, so as to render her wholly worthless, and the shafts of his buggy broken, and his harness ruined; and that by reason of the pile of dirt and gravel so laid up, &c., he has suffered damage to the amount of 500 dollars; Wherefore, &c. Answer, 1. By a general denial. 2. That the defendant did not wrongfully, &c., lay a pile of dirt and gravel in *East* street; but alleges the truth to be that, on, &c., at, &c., the defendant being about to build and engaged in building a house, on lot, &c., bordering on said street, did deposit in said street, near to said building being erected, materials for such building, for a reasonable time and not longer, to-wit, a lot of sand, which is the same "pile of dirt and gravel" complained of. The defendant says he left ample space in said street, to-wit, fifty feet, around said sand, for the passage of all traveling that way, and for wagons, buggies, &c. Wherefore, if any harm came to the plaintiff's buggy,

12	515
130	72
12	515
140	677
12	515
162	168
12	515
168	324
168	325
168	329
168	331



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&c., it was the fault of the plaintiff, &c. 3. The same as the second, adding that at, &c., aforesaid, there was an ordinance of the city of *Indianapolis*, passed *April 20, 1852*, and afterwards continued in force, whereby "persons engaged in building or making pavement, may deposit materials, &c., in any of the streets or alleys for a reasonable time; but no person shall be authorized to fill up any gutter or channel for the passage of water, or so obstruct the said street or alley as to prevent the passage of carriages, nor occupy more than one-third of such street or alley." And the defendant says that he did not fill up any gutter, &c., nor so obstruct said street as to prevent the passage of carriages, nor did he occupy more than one-third of said street; and he left open, unoccupied, and unobstructed, a large space of and upon said street, around said pile, to-wit, sixty feet, along and through which the plaintiff might have safely driven his mare, &c. 4. That the defendant deposited the same, as alleged in the second and third paragraphs, and for the purpose therein named, which is the same pile complained of, as he had a right to do; that the same had not remained there an unreasonable length of time; and the plaintiff, well knowing that said materials were there, carelessly drove his mare and buggy upon said sand, and the mare being old and clumsy, fell and slightly injured the shafts of the buggy, doing no damage to the harness. Demurrer to the second, third, and fourth paragraphs sustained.

*Held*, 1. That, as a general rule, a person who without fault or negligence on his own part, receives a bodily hurt, or suffers damage to his horse or carriage, in consequence of a direct collision with an obstruction in the highway, is specially damnified, and may maintain an action against the author of the obstruction.

2. That a street of a city may be obstructed by placing material for building, &c., in it, for a reasonable time, in a manner likely to occasion the least inconvenience to the public, if from want of room for such material elsewhere, it be necessary to deposit it in the street.
3. That the second paragraph of the answer was bad for not showing a reasonable necessity for placing the building materials upon the street; that the Court cannot infer such necessity from the fact that the building was being erected in a populous and thriving city.
4. That the ordinance pleaded was continued in force by § 84 of the general act of 1852, for the incorporation of cities; that the ordinance is not inconsistent with the provisions of that act, but on the contrary it falls expressly within § 57 thereof, which confers upon the common council plenary power over the streets, &c.; that the ordinance cannot be construed as merely protecting the party depositing an obstruction in the street from prosecution by the city—it protects him likewise from actions brought by other persons.
5. That the common council have exclusive power over the streets, &c., and have the right to determine to what uses they shall be applied, and under what circumstances and to what extent they may be encumbered.
6. That the fourth paragraph of the answer is good.

*Thursday,*  
*June 16.*

APPEAL from the *Marion* Court of Common Pleas.

WORDEN, J.—Complaint by the appellee against the appellant, alleging that on, &c., at, &c., the defendant wrong-



fully, carelessly, and negligently laid a pile of dirt and gravel in *East* street, between *Washington* and *Market* streets, in the city of *Indianapolis*, in said county, which said *East* street was then and there a public highway, and known and used by the public as such, and the plaintiff, in carefully driving along said *East* street, between the streets aforesaid, and being then and there ignorant of the existence of said pile of dirt and gravel, the evening being dark, ran against and upon the said pile of dirt and gravel, whereby his gray mare, of the value of 300 dollars, was then and there thrown down and fatally injured, so as to render her wholly worthless, and the shafts of his buggy broken, and his harness ruined, and that by reason of the pile of dirt and gravel so laid up in the street aforesaid, he has suffered damage to the amount of 500 dollars. Wherefore, &c.

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The defendant answered—

1. By general denial.

2. That he did not wrongfully, negligently, or carelessly lay a pile of dirt and gravel in *East* street, but alleges the truth to be, that on, &c., at, &c., the defendant being about to build, and engaged in building, a house on lot No. —, in square —, in *Indianapolis*, bordering on the said street, did deposit in said street, near to said building being erected, materials for such building, for a reasonable time and not longer, to-wit, a lot of sand, which is the same pile of "dirt and gravel" complained of. The defendant says that he left ample space in said street, viz., the space of fifty feet, around said sand, for the passing and repassing of all traveling that way, and for wagons, buggies, carriages, and other vehicles. Wherefore, if any harm came to the plaintiff's buggy, harness, or mare, it was the fault of the said plaintiff, &c.

3. That the defendant was about to, and engaged in building, as in the second paragraph is alleged, and for that purpose did deposit for a reasonable time, and not longer, sand in said street for said building, which is the same pile complained of (but he denies that it was wrongfully, carelessly, or negligently done), and says that at, &c., aforesaid,



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there was an ordinance of the city of *Indianapolis*, passed *April* 20, 1852, and afterwards continued in force, whereby "Persons engaged in building or making pavement, may deposit materials for such building or pavement, in any of the streets or alleys, for a reasonable time; but no person shall be authorized to fill up any gutter or channel for the passage of water, or so obstruct the said street or alley as to prevent the passing of carriages, nor occupy more than one-third of such street or alley." And the defendant says that, by such deposit, he did not fill up any gutter or channel for the passage of water; nor did he so obstruct said street as to prevent the passing of carriages; nor did he occupy thereby, more than one-third of said street, and left open, unoccupied, and unobstructed, a large space of and upon said street, around said pile, to-wit, sixty feet, along and through which the plaintiff might have safely driven his mare and buggy. Wherefore, &c.

4. That the defendant deposited the sand, as alleged in the second and third paragraphs, and for the purpose therein named, which is the same pile complained of, as he had a right to do; that the same had not remained there an unreasonable length of time, and the plaintiff, well knowing that said materials were there in said street, carelessly drove his mare and buggy upon said sand, and the mare being old and clumsy, fell and slightly injured the shafts of the buggy, doing no damage to the harness. Wherefore, &c.

5. Substantially as the second.

The plaintiff demurred separately to the second, third, fourth, and fifth paragraphs of the answer, and the demurrers were sustained. To the ruling the defendant excepted.

Trial by jury on the general denial; verdict and judgment for the plaintiff, a new trial being denied.

The ruling of the Court on the demurrers, is assigned for error.

The general proposition needs the citation of no authorities in its support, that a person who, without fault or negligence on his own part, receives a bodily hurt, or suffers a damage to his horse or carriage, in consequence of a direct



collision with an obstruction in the highway, is specially  
damnfied, and may maintain an action against the author  
of the obstruction.

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But this rule may be subject to some modifications and restrictions, in its application to particular cases. What would be deemed an illegal obstruction, such as would render the party obstructing liable, in one place and under one set of circumstances, might not in another. The primary and principal use of a highway is for travel; but it is not clear that it may not, in many cases, be legally occupied, in some measure, for other purposes. Thus it is said by a late author on highways (*Ang. on Highw.*, § 25), that "A correct distinction has been suggested between a highway in the country, and a street in a populous commercial city; and it has been considered that the restricted use of highways in the country, has been that they have been needed for no other purposes; but such is not the case with the streets of a city. There are certain uses to which, in modern times, the latter have been generally applied—not uses merely conducive to, but almost necessary for, the comfort, health, and prosperity of the public; and they have been both sanctioned by custom, and approved by experience."

In *O'Linda v. Lothrop*, 21 Pick. 292, 297, it was observed by the Court, that "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use and the acquiescence of the public, is evidence of the right. The owner of land may make such reasonable use of a way adjoining his land, as is usually made by others similarly situated. As to the reasonableness of the use, it may well be laid down, that in a populous town where land is very valuable, it is not unreasonable to erect buildings and fences on the line of the street, and to place doors and gates in them so as when opened to swing over the street. When the owner of a lot in such a situation, has occasion to build, and for that purpose, to dig cellars, he may rightfully lay his building materials and earth within the limits of the street, provided



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he takes care not improperly to obstruct the same, and to remove them within a reasonable time. It is very obvious that without this privilege, it would be, in some situations, nearly or quite impracticable to build at all."

In the case of *The Commonwealth v. Passmore*, 1 Serg. and Rawle, 219, quoted with approbation in *The People v. Cunningham*, 1 Denio, 524, 530, Chief Justice TILGHMAN says: "It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it."

But, on the supposition that the foregoing is a correct exposition of the law, we are of opinion that the second paragraph of the answer is defective in not showing a reasonable necessity for placing the building materials upon the street. There is no averment of facts showing such necessity, and the Court cannot infer it from the fact that the building was being erected in a populous and thriving city. Such necessity should have been shown, either by direct averment, or by facts from which it might be legitimately inferred. There was no error in sustaining the demurrer to this paragraph.

The third paragraph presents a different question. By this paragraph the defendant relies upon an ordinance of the city, whereby "persons engaged in building, &c., may deposit materials for such building, &c., in any of the streets or alleys, for a reasonable time," not occupying "more than one-third of such street or alley." This ordi-



nance, it is alleged, was passed in *April*, 1852. We take it for granted that the city of *Indianapolis* surrendered her former charter, and became a municipal corporation under the act for the incorporation of cities, approved *June* 18, 1852.

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This fact is conceded by counsel on both sides. By the 84th section of this act "All by-laws, ordinances, and regulations, not inconsistent with this act, shall remain and be continued in force until altered or repealed by the common council of such city."

The ordinance in question was continued in force, unless it was inconsistent with the act.

The 57th section of this act is as follows, viz.: "The common council shall have exclusive power over the streets, highways, alleys, and bridges within such city, and to lay out, survey, open, straighten, widen, or otherwise alter the same, to make repairs thereto, and to construct and establish sidewalks, crossings, drains, and sewers. They may cause buildings and structures, in the way of any street or other public improvement, to be taken down and appropriated, upon the payment of damages, as hereinafter provided."

This section confers upon the common council plenary powers over the streets and alleys of the city. In the language of HARRIS, J., in the case of *Milhan v. Sharp*, 17 Barb. (S. C. R.) 437, in speaking of the charter of the city of *New York*—not broader in this respect than the section under consideration—"The corporation yet has the exclusive right to control and regulate the use of the streets in the city. In this respect it is endowed with legislative sovereignty. The exercise of that sovereignty has no limit, so long as it is within the objects and trusts for which the power is conferred. An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the state."

But it is objected that the act gives the common council no power to pass such an ordinance as that in question. After having enumerated various subjects upon which the council have power to pass ordinances in the 35th section,



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and amongst others "to prevent the encumbering of streets squares, sidewalks, and crossings, with vehicles, or any other substance or materials whatever, interfering with the free use of the same," the 38th section provides that "the common council shall have power to make other by-laws, not inconsistent with the laws of this state, and necessary to carry out the objects of the corporation."

The ordinance in question is not inconsistent with the laws of the state, for the reason, if for no other, that it is within the express power and authority conferred upon the common council by section 57, above quoted; and, as by that section, they are invested with full authority over the streets and alleys of the city, ordinances, or by-laws, on the subject of streets and alleys, are necessary to carry into effect the power thus granted.

The ordinance, in our opinion, is not inconsistent with the act, and was continued in force.

This construction is objected to, because there may be an abuse of the power thus conferred upon the common council. The argument, although the Court should not be unmindful of consequences, might well be addressed to the consideration of the legislature, who may at any time abridge the powers of municipal corporations, if they see cause to do so; but it cannot prevail with the Courts against a plain and unequivocal legislative enactment.

It is insisted that the ordinance should be construed merely as a protection to the party thus using a street or alley from a prosecution by the city; but we think such construction cannot prevail. The common council having exclusive power over the streets, highways, and alleys within the city, have the right to determine to what purposes they may be applied, and under what circumstances, and to what extent they may be encumbered. In a populous city, where much business is carried on, and where buildings are being constantly erected, it becomes a matter of necessity that the streets should be used for many purposes other than travel; and it is peculiarly proper that each city should determine for itself what its wants and necessities, in this respect, demand. Having made such determination,



and authorized persons building to place their materials in the street in the manner prescribed by the ordinance, such ordinance, in our opinion, affords a full protection, not only against the city, but all other persons, to every one acting under and within the ordinance.

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This is not an unusual instance of the vesting of authority in municipal corporations. Mr. *Angell* (Ang. on Highw. § 241), says: This power of legitimating obstructions which would otherwise be regarded as nuisances, is not of such sovereign character that it may not be delegated either by a specific act, or by a general grant of authority. Thus, it is a usual provision in our railway charters, that the companies may lay their tracks across or upon public roads or streets, with the consent and under the direction of the town and city authorities. Municipal corporations have also large powers of this description, by virtue of the authority with which they are invested for the regulation and repair of highways. They have an undoubted right, for instance, to obstruct and even entirely discontinue a highway, for the temporary purpose of repairing or regrading it. And in cities and villages there are many uses, aside from their mere use for foot passengers and vehicles moved by animal power, to which the municipal governments may devote the streets under their control, for the promotion of health, trade, commerce, and the public convenience."

The paragraph in question, by its averments, shows the defendant to have been within the terms of the ordinance pleaded, and, in our opinion, the demurrer to it should have been overruled.

We see no substantial objection to the fourth paragraph of the answer. It alleges that the plaintiff, well knowing that the materials were in the street, carelessly drove his mare upon the same, &c. These facts are admitted by the demurrer, and it is clear that under such circumstances the plaintiff cannot recover. *The President, &c., of Mount Vernon v. Dusouchett*, 2 Ind. R. 586.—*The Board of Trustees of the Wabash and Erie Canal v. Mayer*, 10 id. 400. *Vide*, also, Ang. on Highw., § 290. The demurrer to this paragraph should also have been overruled.



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*Per Curiam*.—The judgment is reversed with costs.  
Cause remanded for further proceedings.

*J. L. Ketcham* and *I. Coffin*, for the appellant (1).  
*J. W. Gordon*, for the appellee (2).

(1) Counsel for the appellant cited *Ordinances of Indianapolis, April, 1846*, p. 45, § 4; 1 R. S. p. 221, § 84; *Id.* p. 215, § 57; *Town of Mt. Vernon v. Dousoucheff*, 2 Ind. R. 586.

(2) Counsel for the appellee cited *The State v. Miskimmons*, 2 Ind. R. 440; 5 Blackf. 35; 2 R. S. pp. 175, 428; 3 Blacks. Comm. 215; 10 Serg. and Rawle, 345; 4 M. and Selw. 73, 272; 1 Str. 686; 1 Burr. 333, 337; Co. Lit., p. 56 a; *Butterfield v. Forrester*, 11 East, 60; Buller's N. P., p. 26; Lilly's Abr., tit. nuisance, p. 307, K.; *Iveson v. Moore*, Salk. 15; 5 Rep. 73 a; 4 *id.* 18 a; Vaugh. 341; 2 Saund. 115; 2 Lev. 214; 6 Esp. 6; *Sloan v. The State*, 8 Blackf. 361; *The Shelbyville, &c., Railroad Co. v. Newark*, 4 Ind. R. 471.

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### BOSWELL and Others v. TRAVIS.

Under the statute (Acts of 1855, p. 59), if the plaintiff be absent at the calling of the cause, and fail to answer interrogatories, it is no cause for a continuance, without the affidavit prescribed by the same statute.

Thursday,  
June 16.

APPEAL from the *Tippecanoe* Court of Common Pleas.  
WORDEN, J.—Action by the appellee against the appellants upon a note and mortgage. Judgment for the plaintiff.

The defendants filed interrogatories to be answered by the plaintiff.

Upon the cause being called for trial, the defendants objected to the trial until the plaintiff had answered the interrogatories thus filed; but the Court overruled the objection, and ordered the trial to proceed. There was no evidence before the Court that the plaintiff was absent from the county, except that he was not present in Court. His attorneys offered to swear, but did not swear, that he was absent from the county. The case stands without proof of the presence or absence of the plaintiff, except that he was not present in Court.



Under the statute of 1855 (Acts of 1855, p. 59), in the absence of the plaintiff, his failure to answer the interrogatories was no cause of continuance, without an affidavit as prescribed by that act, and such affidavit was not filed. If the plaintiff was present, the defendants having taken a rule against him to answer the interrogatories, should have proceeded to enforce the same as prescribed by the statute, and his failure to answer, in the absence of cause shown, was no ground for a continuance. *Rice v. Derby*, 7 Ind. R. 649 (1).

Whether the plaintiff was present or absent, there was no error in the ruling of the Court.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*W. F. Lane*, for the appellants.

*S. A. Huff*, *Z. Baird*, and *J. M. La Rue*, for the appellee.

(1) See *Cleveland v. Hughes*, ante, 512.

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FAUSETT v. VOSS.

APPEAL from the *Hamilton* Court of Common Pleas. *Thursday, June 16.*

*Per Curiam*.—Action by the appellee against the appellant, on a note made by defendant to one *A. C. Shropshire*, and by him indorsed to the plaintiff.

Answer, that the note was given for a heifer, a cow, and a bull; that the cow was warranted to be with calf by an imported *Durham* bull, whereby she and the calf would be worth 50 dollars more than if she were with calf by common stock. Breach of warranty, that the cow was not with calf by a *Durham* bull, whereby, &c.

Trial by the Court; finding and judgment for the plaintiff. Two errors are assigned—

1. In overruling the defendant's motion for a continuance; and,

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2. In overruling his motion for a new trial.

The continuance was applied for on account of the absence of a witness. The affidavit filed by the defendant in support of his motion, sets out the facts expected to be proven by the absent witness, corresponding mainly with those set up in his answer, but it does not state that "he believes them to be true." The affidavit was defective in this particular, if in no other. 2 R. S. p. 108, § 322. There was no error in overruling the motion for a continuance.

The record does not disclose the fact that any motion for a new trial was made, except inferentially, by stating that the motion was overruled, while no written reasons for a new trial appear to have been filed at all. This is fatal to the motion. *Kirby v. Cannon*, 9 Ind. R. 371.—*Thompson v. Shaefer*, *id.* 500.

The judgment is affirmed with 5 per cent. damages and costs.

*D. Moss*, for the appellant.

*G. H. Voss*, in person.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
COLLINS.

Thursday,  
June 16.

APPEAL from the *Washington* Circuit Court.

*Per Curiam*.—The same questions are raised in this case as in that of *The New Albany, &c., Railroad Co. v. Fix*, at the present term (1); and for the reasons given, and upon the authorities cited, in that case, the judgment before us must be affirmed.

The judgment is affirmed with 10 per cent. damages and costs.

*W. G. Cooper*, for the appellants.

*J. Collins*, for the appellee.

(1) *Ante*, 485.



## NEWTON and Others v. NEWTON.

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v.  
NEWTON.

Under the R. S. of 1852, a complaint to foreclose a mortgage need not aver that no proceedings had been instituted at law. Such proceedings, if any were had, should be set up in defense.

If the evidence be not in the record, instructions given will be regarded as pertinent to the case made, unless clearly erroneous under any supposable state of facts; and instructions refused will, in that state of the record, be presumed to have been irrelevant.

A request on behalf of either party to have general instructions reduced to writing, should be made in time to enable the Court conveniently to perform that duty. It is too late, when the Court is proceeding to give an oral charge.

APPEAL from the *Lagrange* Court of Common Pleas. *Thursday, June 16.*

DAVISON, J.—*Anna Newton* brought this action against *Luther Newton* and others, the heirs at law of *Datus Newton*, deceased. The object of the suit was to foreclose a mortgage on certain real estate, executed to her by the decedent in his lifetime, viz., on the 14th of *February*, 1846, to secure her in the payment of a sum of money, and the delivery of certain property, as appears in the condition of a bond, in the penalty of 500 dollars, a copy of which, as also a copy of said mortgage, is filed with the complaint. The complaint avers the non-payment of the money, and the non-delivery of the property, demands 500 dollars, and prays a foreclosure and sale of the mortgaged premises, &c.

Defendants demurred to the complaint, on the ground that it does not show what proceedings, if any, had been instituted at law to recover the demand in suit; but their demurrer was overruled, and they excepted.

As the law stood prior to the revision of 1852, the complaint, upon the ground assumed by the demurrer, would have been objectionable. R. S. 1843, p. 461, § 37. But under the revision now in force, we have decided that an averment that no proceedings had been instituted at law, was not essential to the validity of a complaint to foreclose a mortgage; that such proceedings, if any were had,



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The demurrer being overruled, the defendants answered—

1. By a general traverse.

2. That before the commencement of the suit, they fully paid and satisfied the whole amount claimed, in money and property.

Reply in denial of the second paragraph. Verdict for the plaintiff. And the Court, having refused a new trial, rendered judgment, &c.

The record shows that, at the proper time, various instructions moved by the defendants were refused by the Court; and that the Court, of its own motion, instructed the jury; but it fails to set out the evidence. And the settled rule is, if the evidence be not in the record, instructions given will be regarded as pertinent to the case made, unless clearly erroneous under any supposable state of facts; and instructions refused will, in that state of the record, be presumed to have been irrelevant. 8 Ind. R. 502. Under this rule, we must, in this instance, presume, in favor of the ruling of the Court, that the instructions moved by the defendants were not pertinent to the evidence; and having carefully examined those given, we can readily perceive a state of facts, pertinent to the issues, in which they would not have been erroneous. The evidence not being in the record, there is, in this case, nothing properly before us relative to the instructions.

In a bill of exceptions, it appears that while the cause was on trial, after the counsel had closed the argument, and when the Court was about to charge the jury, the defendants moved the Court to give no charge except it be in writing; but the Court, over his motion, gave to the jury an oral charge upon the questions of law in the case. The code says: "When the argument of the cause is concluded, the Court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party." 2 R. S. p. 110, § 324. We have a similar provision relative to the practice in criminal cases (*id.* 376, § 113), under which we



have held that a request to reduce general instructions to writing should be made in time to enable the Court conveniently to perform the required duty; that it was too late, when the Court was proceeding to give an oral charge, to make such a request. *McJunkins v. The State*, 10 Ind. R. 140. This decision seems to be in point; and the result is, that the statute must be so construed as to require the party who desires a written charge, to notify the Court, in a reasonable time before it may be called on to charge the jury, of his desire that such charge be in writing.

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*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*A. Ellison*, for the appellants.

### WATKINS and Another v. COLUMBIA.

APPEAL from the *Dearborn* Circuit Court.

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*Per Curiam*.—In this case, no brief has been filed by either party, and the errors assigned will, therefore, be considered as waived. 11 Ind. R. 492.

The appeal is dismissed with costs.

*J. Ryman* and *B. Spooner*, for the appellants.

*W. S. Holman*, for the appellee.

### THE STATE on the relation of LEACH v. SCOTT and Another.

It is no breach of the condition of an executor's bond that he neglected to inventory and sell the goods of his testator, unless they have come to his knowledge.

For an executor to convert any portion of the testator's property to his own use, is a breach of the condition of his bond.



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Where one, only, of several breaches of the condition of such bond is well assigned in a complaint thereon, a general demurrer thereto should be overruled.

APPEAL from the *Hendricks* Court of Common Pleas.

DAVISON, J.—This was an action by the state, on the relation of the appellants, against *Scott*, an executor, and *Hunt*, his surety, upon a bond, conditioned in the usual form, for the faithful discharge of the duties of the executor. The will of one *William Montgomery*, of which *Scott* is the executor, contains these provisions: 1. I give to my wife a good living, out of the proceeds of the sale of my personal property, left in the hands of my executor, who is to furnish her with all necessary boarding, lodging, and clothing, suitable for her during her natural life. The 2d, 3d, 4th, and 6th clauses of the will bequeath three specific legacies, which are directed to be paid out of money due the testator, viz., to his daughter, *Mary Howard*, 100 dollars; to his daughter, *Elizabeth Leach*, 50 dollars; and to his daughter, *Melinda Scott*, 50 dollars. 5. I request my executor to sell all my personal property, except one bed and bedding, and one gray mare, which I give to my wife during her natural life. The 7th clause, after making provision for the payment of the testator's debts and funeral expenses, out of the proceeds of the sale of his personal property, directs the remainder to be divided equally between his four daughters, *Mary Howard*, *Elizabeth Leach*, *Matilda Leach*, and *Melinda Leach*, and his son, *James Montgomery*. The 8th directs the sale of his farm, and the money arising therefrom to be divided between his said four daughters and son; and the 9th directs the sale of his real estate for the payment of his debts and funeral expenses.

Three breaches of the condition of the bond are assigned—

1. That *Montgomery*, at his death, owned certain articles of personal property (describing them), all of which, except the aforesaid bed, bedding, and gray mare, was by him, in and by said will, directed to be sold, &c. And that the defendant, *Scott*, having entered upon his duties as executor, &c., has wholly failed to sell any of the following articles



of property (describing them), being a part of the personal property owned by the decedent at his death, as above described, of the value of 300 dollars; and which property he, the defendant, has converted to his own use, &c.

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2. That *Scott*, the defendant, after qualifying as such executor, neglected and refused, and still doth neglect and refuse, to inventory the following personal property (describing it), of which the testator died possessed, and which is of the value of 300 dollars.

3. That said executor, being duly qualified as such, hath converted to his own use certain articles of property (describing them), which are of the value of 400 dollars, and of which the testator was owner at the time of his death, &c.

It is averred that said *Matilda*, one of the relators, being a residuary legatee under the will, is entitled to maintain this suit in the name of the state, &c.; and that the said state, for the use of the relators, is entitled to sue for and recover the value of the property unsold, not inventoried and converted, &c., as aforesaid. The complaint demands judgment for 400 dollars, and other proper relief, &c. Demurrer to the complaint sustained, and final judgment, &c.

The code, art. 48, ch. 10, provides, that any executor, &c., may be sued on his bond, by any creditor, heir, legatee, &c., for certain causes which are specifically pointed out, and among which are the following, viz: Failure to inventory the property of the decedent, to return inventories, appraisement bills, sale bills, reports and accounts of sale, according to law; embezzling, concealing, or converting to his own use such property; and any other violation of the duties of his trust: and further it is provided, that such suit may be brought by and on the relation of any creditor, heir, legatee, &c., and the measure of damages in all such suits, shall be the value of the property converted, destroyed, embezzled, or concealed, &c.; and no stay of execution, or benefit of appraisement laws, shall be allowed on a judgment on such bond, as to the property of the principal, and all damages so collected shall, by the officer collecting the same, be paid into the proper Court of



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Common Pleas, when, after deducting and paying to the relator in such suit a reasonable compensation for his services therein, it shall be disposed of according to the laws regulating the distribution of the property of the decedent. 2 R. S. pp. 285, 286, 287, §§ 162, 163, 164.

Under a proper construction of the will, though in its provisions there is an apparent conflict, the proceeds of the sale of the testator's personal property should be first applied to the maintenance of the widow, as therein prescribed, during her natural life; and further, the proceeds of the sale of his real estate constitutes the proper fund out of which his outstanding debts are to be paid. Still, she was simply to have her support during life, and if at her death any portion of the fund appropriated to her maintenance remained in the hands of the executor, it would then be his duty, under the will, to make distribution of the amount, so in his hands, among the residuary legatees. Now, the relator is one of the legatees; and if, as charged in the complaint, the executor has failed to inventory or sell the property, or has converted it, or any part of it, to his own use, or has committed any breach of duty, relative to the management of the trust, in any degree calculated to diminish the respective portions of the legatees, expectant on the death of the widow, the right of any such legatee to institute suit on the executor's bond, seems to be fully authorized by the statutory provisions to which we have referred.

But it is insisted that the complaint is defective, because it claims damages, not for the estate to be distributed, but simply for the relators, making them their personal claim. There is nothing in this objection. The Court may, notwithstanding the mode in which damages are claimed, render the appropriate judgment upon the case made. The amount recovered must be paid into the Common Pleas, and it is for that Court to make such disposition of the money as may accord with the provisions of the will.

Again; it is contended that the first and second breaches are insufficient, because, for aught that appears, the property has been left with the widow for her "comfort and



support," and that after making such support, nothing from that source would be coming to the relators. The answer to this is, that the executor was in duty bound to inventory and sell the property, and having failed to do so, must be held liable for such failure; and, moreover, the widow was not entitled to the property itself; the will directed the executor to allow her a maintenance out of the proceeds of its sale, and whether anything from that source would be coming to the relators, could not be well ascertained until after her decease.

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These breaches, however, are both defective. They allege that the executor failed to inventory, and neglected to sell, the property, without alleging that the same had come to his knowledge. 2 R. S. pp. 255, 257, §§ 34, 47.

But the third breach is unobjectionable. It charges affirmatively, that the executor had converted the property to his own use. Hence, the demurrer, applying, as it does, to the entire complaint, should have been overruled.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave and J. Witherow, for the appellant.

J. M. Gregg and H. C. Newcomb, for the appellees.

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A demurrer to a complaint, because "the complaint does not state facts enough to entitle the plaintiff to relief," is substantially within the fifth specification of § 50, 2 R. S. p. 38.

A complaint under oath charging an administrator with having failed to make out and return proper inventories and sale bills, as required by § 34, 2 R. S. p. 255, and § 45, *id.* p. 257, is sufficient to authorize the removal of the defendant for neglect of his duty as such administrator, under the provisions of § 22, 2 R. S. p. 252.

An inventory and appraisement under the provisions of 2 R. S. p. 279, in regard to the "disposition of estates not worth over 300 dollars," do not dispense with the necessity of making an inventory and appraisement by an administrator subsequently appointed.

An inventory and appraisement made under the statute in relation to the



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"disposition of estates not worth over 300 dollars," is not conclusive on the question of the value of the property.

The widow of the decedent in such case, is sufficiently interested in the estate to entitle her to maintain a suit to remove the administrator for failing to make and return an inventory.

When the Court decides against a party on demurrer, he may except to the ruling of the Court by bill of exceptions; and, when such bill states that "after hearing the argument the Court sustains the demurrer, to which opinion of the Court the plaintiff excepts," it is sufficiently shown that the exception was taken at the time.

In such case no bill of exceptions is necessary.

A joint demurrer filed by two defendants should be overruled, unless it be well taken as to both.

Thursday,  
June 16.

APPEAL from the *Wells* Court of Common Pleas.

WORDEN, J.—Complaint by *Penelope Pace* against the defendants, alleging that she is the widow of *Michael Pace*, deceased, who died in *Wells* county on the 27th of *February*, 1855, leaving less than 300 dollars worth of property, which was duly appraised by two competent appraisers, one of whom was appointed by the clerk and one by the plaintiff, at the sum of 275 dollars, 30 cents, which appraisement was duly filed in the office of the clerk of said Court; whereupon she claimed that the property should be set off to her, &c.; that afterwards said *Oppenheim*, to defraud her of her just rights in the premises, filed his affidavit in the office of the clerk of said Court, to the effect that the firm of *Daily* and *Oppenheim* were creditors of said *Michael*, and that said *Oppenheim* was informed and verily believed that the real estate of said decedent was improperly valued, and that said estate exceeded in value 300 dollars; whereupon two other appraisers were appointed, who afterwards returned their appraisement, and thereupon the said *Oppenheim* was appointed administrator of said estate by said Court; that the last-mentioned appraisers did not examine all of the property, but fraudulently reported that it had been exhibited to them, when in fact they had not seen all the personal property, and returned a fraudulent appraisement beyond the true and fair value of the property, to cheat and defraud the plaintiff out of said property, and with the fraudulent intent to have the said *Oppenheim* appointed



administrator of said estate; that said *Oppenheim*, in pursuance of said fraudulent design, never had said property inventoried and appraised; that the last-mentioned appraisers knew, at the time they returned their appraisal, that it was unjust, and that if a fair appraisal had been had, the property, both real and personal, would have been set off to her; that *Oppenheim*, without having inventoried and appraised the interest of the decedent in a certain piece of land described in the complaint, sold or pretended to sell the same, without warrant of law, to one *George T. Biddill* (who was made defendant, but as to whom process was returned "not found,") who pretended to buy the same, with a full knowledge of all the facts set forth, and with the intent to further the fraudulent designs of said *Oppenheim*, but has never paid or tendered, nor has *Oppenheim* ever received any money on said purchase; that with a full knowledge of all the facts, the said *Thomas* bought, or pretended to buy, said land from *Biddill*, but the same has not been conveyed; that all the acts herein set forth were consummated with the express design to cheat and defraud the plaintiff out of her said property; that the last-mentioned appraisers were appointed at the *April* term of the Court, 1855, and did not make their return until the *October* term of the same year; that the appointment of *Oppenheim* as administrator was obtained by fraud, &c.

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Wherefore the plaintiff prays that said appointment be revoked and set aside, and all his acts as such administrator be declared null and void, and that the possession of the real and personal estate of decedent be delivered to her, and that the defendants be restrained and enjoined from proceeding in the matter herein set forth, and for such other and further relief as will be just.

The defendants, *Oppenheim* and *Thomas*, appeared and filed a demurrer to this complaint, which was sustained by the Court, and exception was taken. Final judgment was rendered for the defendants.

The plaintiff brings the case here, and assigns for error the ruling of the Court below on the demurrer.



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The cause of demurrer assigned is, that "the complaint does not contain facts enough to entitle the plaintiff to relief."

It is objected that the demurrer is insufficient as not conforming to the statute; but we think it is substantially within the fifth specification of § 50, 2 R. S. p. 38.

We are of opinion that, for one purpose, the complaint is good as against *Oppenheim*, viz., as an application for his removal for a neglect of his duty as such administrator. It is duly verified as the statute requires for that purpose, and charges that he has never caused the property to be inventoried and appraised, and that without appraisement or authority of law he has proceeded to sell certain real estate of the decedent, &c.

The statute requires the administrator to make out a full inventory of the personal property within sixty days after his appointment, and cause the same to be appraised, and within thirty days thereafter to file the same in the clerk's office. 2 R. S. pp. 255, 257, §§ 34, 44. It is also provided (p. 252, § 22), that an administrator may be removed, and his letters superseded, on the written application, verified by oath, of any person interested in the estate, when, amongst other things, "he shall fail to make and return inventories and sale bills, or to render an account of his administration according to law or the order of the Court, or shall waste, or fail to pay over according to law, the money of such estate."

The inventory and appraisement made previously to the issuing of letters of administration, under the provisions of the statute for the "disposition of estates not worth over 300 dollars" (2 R. S. p. 279), do not dispense with the necessity of such inventory and appraisement being made by the administrator if one be appointed. Such preliminary inventory and appraisement are only made for the purpose of determining whether administration shall be granted on the estate, or whether the whole property shall go to the widow, being not over 300 dollars in value. When, by such proceeding, it is ascertained that the estate consists of more than 300 dollars in value, administration



is granted, and the same duty devolves upon the administrator as if he had been appointed without any such preliminary steps having been taken. He is required to return his inventory, accompanied with an affidavit "that the same is a true statement of all the personal estate of the deceased which has come to his knowledge." 2 R. S. p. 257, § 45.

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The preliminary inventory and appraisement may or may not embrace all the property, and it is not accompanied with the affidavit of any person that it does contain all of such property. And again, the preliminary appraisement is not conclusive, even on the question of the value of the property appraised; for if the administrator, at any time, discover that the estate is worth not over 300 dollars, he is required to report that fact to the Court, and the property, after deducting the expenses of administration, is to be delivered to the widow. 2 R. S. p. 279, § 135. How shall the administrator make such discovery, except by making a proper inventory of the estate, and causing it to be duly appraised?

The widow is "interested in the estate" sufficiently to make the application for a removal of the administrator under the statute; and the facts charged, in reference to the neglect of the administrator to make a proper inventory and appraisement of the property, are sufficient to require such removal.

There is a question made as to the sufficiency of the exception to the ruling of the Court on the demurrer. A bill of exceptions filed, as the clerk certifies, during the progress of the cause, says that "now come the parties, and the defendants file their demurrer, &c., and after hearing the argument of parties, the Court sustains the demurrer, to which opinion of the Court, &c., the plaintiff excepts," &c.

We think the bill of exceptions sufficiently shows on its face that the plaintiff excepted to the decision at the time it was made, and that the mode of excepting, viz., by a bill of exceptions, is sufficient. There is no noting of any exception in the record at the end of the decision,



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and the only exception taken is contained in the bill of exceptions. No bill of exceptions would be necessary to save the question arising on demurrer; because the ground of objection would appear in the entry, and the party might except by causing it to be noted at the end of the decision, that he excepts. But we are of opinion that a party may also except to the ruling on demurrer in the more formal way of a bill of exceptions. No particular form of exception is required. 2 R. S. p. 115, § 344. The statutory provision dispensing with the necessity of a formal bill of exceptions in cases where the ground of objection appears in the entry, does not take away the effect of an exception taken in a more formal and well known way. Of course what is said in *Zehnor v. Beard*, 8 Ind. R. 96, and *Young v. McLane*, *id.* 357, as to the necessity of the exception being noted at the end of the decision, must be held applicable only to cases where no exception was taken to the ruling by a bill of exceptions formally prepared and made a part of the record.

The demurrer was filed by both *Oppenheim* and *Thomas*, and not being well taken as to *Oppenheim*, it ought to have been overruled.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. March*, for the appellant.

*L. M. Ninde* and *Z. Puckett*, for the appellees (1).

(1) Counsel for the appellees cited the following authorities :

1. Did the plaintiff take his exceptions at such time and in such manner as to enable him to raise any question in the Supreme Court? See 2 Bouv. L. D. 430; 4 Wash. C. C. 698; *Hornberger v. The State*, 5 Ind. R. 300; *Zehnor v. Beard*, 8 *id.* 96; *Young v. McLane*, *id.* 357.

2. Can the appointments, orders, and judgments of the Court of Common Pleas, sitting as a Court of Probate, be called in question by a complaint addressed to that Court exercising its chancery powers? Can they be collaterally impeached? See *Bissell v. Briggs*, 9 Mass. R. 462; *Termor's case*, 3 Rep. 79; 1 Phil. Ev. 341, 344, 346; 3 *id.*, Cow. and Hill's note, 600; *Allen v. Dundas*, 3 T. R. 130; 1 Conn. R. 8; 4 Day's Cas. 221; 5 Johns. Ch. 342; *Riser v. Snoddy*, 7 Ind. R. 442; *Ray v. Doughty*, 4 Blackf. 115; 5 Ind. R. 36; *Doe v. Anderson*, *id.* 33; *Babbitt v. Doe*, 4 *id.* 355; *Thompson v. Doe*, 8 Blackf. 336; *Doe v. Harvey*, 5 *id.* 487.



## THOMPSON and Another v. ALLEN and Another.

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The assignee of an equitable title to land, takes it subject to all existing equities.

The assignee of a covenant for the conveyance of real estate is not entitled to demand specific performance thereof, unless his assignor was in a situation to have demanded it.

APPEAL from the *Decatur* Circuit Court.Thursday,  
June 16.

WORDEN, J.—Complaint by the appellants as the executors of *John Thompson*, deceased, against the appellees, alleging that in 1836 the said *Jefferson W. Allen* purchased from the *United States* certain lands described in the bill, situated in *Decatur* county, and fully paid for the same, and took from the receiver certificates of such payment; that afterwards, on the 16th of *November*, 1838, for a valuable consideration, to-wit, 1,000 dollars, paid to said *Allen* by one *David Ferrier*, the said *Allen* sold said lands to said *Ferrier*, and executed to him a covenant in writing, binding himself, his heirs, &c., to make to *Ferrier*, his heirs or assigns, a general warranty deed for said lands, as soon as a patent therefor could be obtained from the *United States*; that in and by said covenant it was stipulated that *Ferrier* had, at that date, fully paid said *Allen* for the land, and *Ferrier* was authorized thereby to forthwith take possession of the same. The covenant mentioned is set out, and is as follows, viz:

“I hereby bind myself, my heirs, executors, and administrators, to make, or cause to be made, to *David Ferrier*, his heirs or assigns, a general warranty deed for two hundred and forty acres of land in *Decatur* county, in the state of *Indiana*, being, &c. (here follows a description of the land), so soon as a patent from the *United States* can be obtained for said land. Said *Ferrier* has paid me in full for said land, and is authorized to take possession forthwith. Witness my hand and seal, this 16th *November*, 1838. [Signed] *Jefferson W. Allen*. [Seal.]”

It is further averred, that on the 27th of *September*, 1839, *Ferrier* was indebted to said *John Thompson* (then in life),



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in the sum of 250 dollars, 48 cents, and to one *Jane Innis* in the sum of 396 dollars, 91 cents; and for the purpose of securing the payment of those sums within thirty days, and making the same a lien on the land, *Ferrier*, being in possession thereof under his purchase, executed and delivered to said *Thompson* and *Innis* a mortgage on the same for the purpose aforesaid, which was duly recorded; and for the purpose of more effectually securing the payment of said money, *Ferrier*, at the same time, assigned said covenant to *Thompson* and *Innis* to secure them the respective sums due them, which assignment was also duly recorded; that *Allen*, at the time thereof, had full notice of said mortgage and assignment; that he has procured patents for the land, and has them in his possession; that the legal title is in *Allen*, and that he has not conveyed in pursuance of his covenant; that the sum due on the mortgage to *Thompson* is unpaid, &c.; that *Ferrier* is wholly insolvent, and has no means whatever, save the lands, out of which the debt can be made. There are other matters stated in the complaint, in reference to supposed subsequent incumbrances, but as no question arises upon them, they need not be noticed.

Prayer, that the land, or enough of it to pay the debt, be sold; that *Allen* be required to make a deed, or in default, that a commissioner be appointed for that purpose, &c.

*Jane Innis* is made a defendant, who appears and answers, admitting the facts stated, and prays relief.

A default was taken as to *Allen*, and a decree rendered for the plaintiff; but being a non-resident, and having been brought into Court by notice only, he applied, within the time limited by the statute, and procured the default to be set aside, and filed his answer.

*Allen's* answer admits the purchase of the land by him, as charged, and that he has procured the patents for the same. He admits the sale of the land to *Ferrier*, or rather an exchange of it for certain property in *Ohio*. He admits the execution of the covenant to *Ferrier*, but avers that at the same time *Ferrier* gave him a bond for in-lot No. 66, in *North Georgetown*, *Brown* county, *Ohio*, by



which he bound himself to make to *Allen* a general warranty deed for said property, by the 15th day of *April*, 1840, which obligation is set out as follows:

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"This shall oblige me, my heirs, executors, and administrators, to make, or cause to be made, to *Jefferson Allen*, his heirs or assigns, a general warranty deed for in-lot No. sixty-six (66), in *North Georgetown*, *Brown* county, *Ohio*, by the 15th day of *April*, 1840, containing a brick building, with other improvements. Said *Allen* is to have possession thereof immediately, except of the part occupied by *A. Ellison*, Esq.; of that, by the first of *January* next. Witness my hand and seal, this 16th of *November*, 1838. Said *Allen* has paid me in full. [Signed] *David Ferrier*. [Seal.] Attest: *Joseph Shepherd*."

It is averred that *Ferrier* exchanged with said *Allen* the lot in *Georgetown* for the land in *Indiana*, which was the only consideration he gave, or avers to give, for the *Indiana* lands; that at the time of the exchange, there were divers liens on the *Georgetown* property, in the form of a mortgage, and for a balance of purchase-money unpaid by *Ferrier*, he not having received a title therefor; that to make *Allen* safe, and indemnify him against said liens, *Ferrier* assigned to him certain notes, which, as far as possible, have been collected and applied to the discharge of such liens, still leaving a balance of over 900 dollars outstanding as liens upon the property; that *Ferrier* has never discharged the liens on the lot, nor any part thereof, nor made a deed to *Allen* for the same; that the legal title to the *Georgetown* property has never been obtained, and that in addition to the liens, there are contingent rights of married women against the same; that the *Georgetown* property was the only consideration for the land; that *Ferrier* never paid any money for the same, but the foregoing is the manner of payment specified in the bond or covenant from *Allen* to *Ferrier*; that *Ferrier* has never performed any part of his agreement, and that *Allen* had no knowledge of the mortgage or assignment set up until within fourteen months last past.

The foregoing are the substantive matters set up in the



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answer. To this answer the plaintiffs demurred, and on the demurrer being overruled, they excepted.

A replication in denial was filed, and the cause was tried by the Court, resulting in a finding and judgment for the defendants.

The errors relied upon to reverse the judgment are—

1. That the Court below improperly set aside the former decree, without a sufficient answer having been first filed.

2. The Court improperly overruled the demurrer to *Allen's* answer.

3. The Court erred in dismissing the plaintiffs' bill, and in refusing to enter a decree upon the bill for the foreclosure of the mortgage.

The first and second errors relied upon, involve but one question, and that is, whether the answer is sufficient and valid.

The application to the case, of a few well settled principles, will be sufficient to dispose of it. The plaintiffs' testator was but the purchaser of a merely equitable title, and he cannot occupy the position of a *bona fide* purchaser of a legal title, without notice of a prior equity. The doctrine, as applied to a *bona fide* purchaser of a legal title without notice, has no application to a purchaser of a mere equity, but such purchaser takes subject to all prior equities. 2 Lead. Cases Eq., part 1, pp. 63 to 68. In the case of *Chew v. Barnet*, 11 S. and R., 389, where the question was, in substance, as to the right of a vendor to refuse to make a conveyance of the legal title to a purchaser from the vendee, without receiving payment of the whole purchase-money, GIBSON, C. J., said that "When it is asserted that a purchaser, for a valuable consideration, takes the title free of every trust or equity of which he has no notice, it is intended of the purchase of a title perfect on its face; for every purchaser of an imperfect title, takes it with all its imperfections on its head. It is his own fault that he confides in a title which appears defective to his own eyes, and he does so at his own peril. Now every equitable title is incomplete on its face. It is, in truth, nothing



more than a title to go into chancery to have the legal estate conveyed; and, therefore, every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice of it or not. But the purchaser of a legal title, takes it discharged of every trust or equity which does not appear on the face of the conveyance, and of which he has had no notice either actual or constructive."

The interest passing to *Thompson* and *Innis* by the mortgage and assignment being a mere equity, we are of opinion that they occupy a position no more favorable than that of *Ferrier* himself, and are entitled to no rights as against *Allen*, except such as *Ferrier* might claim for himself.

It is insisted that *Allen*, having put *Ferrier* in possession of the land under the contract of sale, and having, in the contract, acknowledged the receipt of the purchase-money, thus holding *Ferrier* out to the world as the owner, is estopped from denying what is thus admitted in the contract. We are of opinion, however, that the doctrine of estoppel, either legal or equitable, is not applicable to the case. *Allen* did no act to induce the assignment. He held out no inducement to any one to purchase. He did not stand by while the purchase or assignment was being made, nor was he cognizant of the transaction. He was never placed in a position where he would be called upon in equity and good faith to notify any one of the condition of *Ferrier's* claim. He simply made the contract as set forth, and that does not estop him from setting up his defense to the complaint for specific performance.

The two papers executed by the parties, are but parts of one contract, and are to be treated as together constituting a single instrument. *Leach v. Leach*, 4 Ind. R. 628, and authorities there cited.

Such being the case, it follows that specific performance cannot be compelled against *Allen*; because the contract has been in no part performed by *Ferrier*. Before *Allen* can be compelled to perform the contract on his part, the incumbrances on the *Georgetown* property must not only

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be removed, but a deed must be made or tendered to him for the property.

It is insisted that the Court should not have dismissed the bill, but, the defense being allowed to prevail, so far as the incumbrances on the property in *Georgetown* are concerned, that the property should have been ordered to be sold, and the proceeds applied to the payment of the incumbrances first, and then to the plaintiffs' claim.

But this clearly should not have been done, unless the Court could, in some way, vest the legal title to the property in *Georgetown* in *Allen*. This the Court could not do, as the property lies beyond its territorial jurisdiction. *Allen* cannot be required to part with his legal title to the property in controversy, until the legal title to that for which this was given in exchange, is secured to him. A decree *in personam* against *Ferrier*, that he convey the *Georgetown* property to *Allen*, might be utterly valueless to him, and this is all the Court could do by way of securing him his title.

On the whole, we are of opinion that the judgment below is right, and must be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

DAVISON, J. was absent.

*J. Gavin, J. R. Coverdill, and O. B. Hord*, for the appellants.

*J. S. Scobey and W. Cumback*, for the appellees.

### ZEKIND and Others v. NEWKIRK and Others.\*

Bill in chancery to foreclose a mortgage. The facts were these: *A.*, in 1838, bought the mortgaged premises of *B.*, and for a part of the purchase-money indorsed to *B.*, in blank, two promissory notes, to secure the payment of which he executed the mortgage. The notes and mortgage were assigned

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\* This case was decided on the 8th day of December, 1858; but it has been held back on petition for a rehearing until this day.



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v.  
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to C., who, without suit against the makers of the notes, brought suit to foreclose the mortgage. The condition of the mortgage was, that if the notes (describing them) were paid at the time for the payment thereof by the makers, &c., or by A., the indorser, &c., without delay, the indenture and the estate granted was to be void; but in case of failure of such payment, the indenture and the estate granted were to be absolute. It was proved that the notes, or some part of them, could have been collected from the makers had diligence been used; that in 1839 and 1840 they owned personal property, &c.; that no demand was made upon them for the money; that A. was never notified of non-payment; that in 1842 the makers were decreed and certified bankrupts.

*Held*, 1. That diligence was not used; that if it had been, it would have been availing; and, hence, that A. was not liable as an indorser.

2. That the indorsements cannot be construed as a part of the condition of the mortgage, because they were made concurrently with it.

3. That an indorsement, though in blank, is a written contract; but its terms may be varied or controlled by a contemporaneous written agreement.

4. That the parties, in this case, intended so to control the contracts implied by the indorsements; because by the condition of the mortgage they agreed that the deed should become absolute, if the notes were not paid when due, without delay; and because the mortgagor agreed to pay the notes if the makers failed.

5. That the whole transaction showed that the notes were assigned to the mortgagees, and were by them accepted, in view of their payment when they matured.

#### APPEAL from the *Allen* Circuit Court.

Thursday,  
June 16.

DAVISON, J.—This was a suit in chancery commenced in *January*, 1853, by the appellees, who were the plaintiffs, against *Charles Zekind* and others, to foreclose a mortgage. The Circuit Court, at its *March* term, 1857, rendered a decree for the plaintiffs, from which the defendants appeal to this Court. The facts, so far as they relate to the errors assigned, are these: *Zekind*, in *August*, 1838, bought of *S. and W. Edsill* the mortgaged premises. For a part of the purchase-money, he indorsed to the *Edsills*, in blank, two promissory notes; and to secure the payment of the notes, he executed to them the mortgage in question. The notes and mortgage were duly assigned to *Newkirk, Mulford, & Co.*, who, without the institution of any proceedings against the makers of the notes, brought this suit to foreclose, &c. The following is the condition of the mortgage: "These presents are upon this express condition, that if two promissory notes, numbered 2 and 3,



May Term, 1859. *dated July 24, 1836, signed by G. H. Long and T. J. Clawson, and payable to Charles Zekind & Co.—No. 2 given for 350 dollars, payable nine months after date, and No. 3 given for 700 dollars, payable at seventeen months—be well and truly paid at the time for the payment thereof, by the said Long and Clawson, their heirs, &c., or by the said Charles Zekind (by whom the notes were indorsed to S. and W. Edsill), his heirs, &c., without delay, then and from thenceforth this indenture, and all the estate hereby granted, shall cease and be void, &c.; but in case of failure of the payment as herein above specified, then this indenture, and the estate hereby granted, is to remain absolute and in full force and virtue in law.”*

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It was proved that the notes, or some part of them, could have been collected from the makers, had due diligence been used after they respectively became due; that the makers, in the years 1839 and 1840, owned personal property in their possession to an amount greater than the amount stated in the notes; that no demand upon the makers of the notes was made for the money; that *Zekind & Co.* were never notified of their non-payment; and that, in the year 1842, the makers were decreed and certified bankrupts, under the bankrupt law of the *United States*.

These facts plainly show that, for the collection of the notes from the makers, no diligence was used; and, further, that due diligence, had it been used, would have been availing. It follows that when this suit was brought, the defendants were not liable as indorsers of the notes. 2 Blackf. 350.—6 *id.* 285.—8 *id.* 304.—7 Ind. R. 247.

But in support of the decree, it is insisted, that a true construction of the condition of the mortgage, renders the failure to use due diligence against the makers of the notes, or an excuse for not using it, unimportant in the discussion of this case; because the condition expressly stipulates that the estate mortgaged shall become vested absolutely in the mortgagees, unless the notes are paid by the makers or the assignors at the time for the payment thereof, without delay. This stipulation is, indeed, very explicit, and seems to authorize the foreclosure of the mortgage upon



the mere failure to pay the notes at maturity. It is, however, contended, that the indorsements, being made concurrently with the mortgage, should be construed as parts of the condition. We are not inclined to adopt this construction. It may be that the indorsements and mortgage should be considered one transaction, and constitute but one contract between the parties; but when so considered, the inquiry arises, what is that contract? It was, no doubt, competent for the parties so to stipulate in the condition of the mortgage as to waive the necessity of suing, in the first instance, on the notes. Have they done so? True, an indorsement, though in blank, is, in legal effect, a written contract; yet its terms, which the law defines, must be varied, and even controlled, by a written contemporaneous agreement. And in this case, it is not an unfair conclusion, that the parties intended to control the contracts implied by the indorsements; because, in the condition to which we have referred, they expressly agree that the deed of mortgage shall become absolute, if the notes are not paid at the time for the payment thereof, without delay. And such intent is not even doubtful, when it is noted that the mortgagor himself stipulated, in effect, that he would pay the notes, in the event that the makers failed to pay them as they respectively became due. We are of opinion that the whole transaction, as it appears in the record, when fairly construed, at once shows that the notes were assigned to the mortgagees, and by them accepted, in view of their payment as they matured.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*R. Breckenridge* and *D. H. Colerick*, for the appellants.  
*C. Case*, for the appellees.

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GRIFFITH v. THE STATE.\*

12 548  
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v.  
THE STATE.

A motion for a change of venue in criminal actions is, under the statute, addressed to the sound discretion of the Court; and the Supreme Court will not reverse a judgment because such motion has been overruled by the Court below, unless an abuse of that discretion appear from the record.

It is not error to refuse to postpone a cause on account of the testimony of an absent witness, unless the materiality of such testimony is shown.

A new trial ought not to be granted because of the admission of improper evidence upon the former trial, unless the illegality thereof be shown.

It is no error that the Court overruled a motion in arrest of judgment, when it does not appear from the record that any such motion was ever made.

Thursday,  
June 16.

APPEAL from the *Montgomery* Circuit Court.

HANNA, J.—Indictment for larceny and robbing. Plea not guilty. Trial; verdict of guilty on the second count. Motion for a new trial overruled, &c.

The errors assigned are—

*First*.—On the ruling upon the application for a change of venue.

The reasons given in the affidavit for a change are, prejudice and undue excitement growing out of the trial of the co-defendants of affiant. This was, under the statute, a question for the sound discretion of the Court. 7 Ind. R. 164.—8 *id.* 441. We cannot perceive any abuse of that discretion.

*Second*.—On the ruling upon the motion to continue.

The affidavit avers that the affiant can prove, by one *Amanda Guinup*, that *William Guinup*, her husband, and a co-defendant, “returned home on the night of the alleged larceny and robbery, about the hour of ten o’clock, P. M., and remained at his home all the balance of said night; and that from said ten o’clock of said night, said *Guinup* was not in the company of this defendant, and could not be.” The balance of the affidavit is in reference to the reason of the absence of the witness, &c.

Would the facts alleged in the affidavit have been material if proved.

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\* This case was decided on the 16th day of *February*, but held back on petition for a rehearing until this day.



This question we are not prepared to answer, for the reason that the evidence is not in the record, and, therefore, we are not informed as to the precise period of time at which the commission of the offense was attempted to be established. Averments were wanting in the affidavit to make it sufficient, before trial, to accomplish the object sought; and, after the evidence had been heard, the Court, looking to that evidence and the affidavit, overruled a motion for a new trial. In the absence of the evidence, we must presume in favor of that ruling. *Detro v. The State*, 4 Ind. R. 200.—*Hubbard v. The State*, 7 *id.* 160.

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GRIGGS  
v.  
VICKROY.

*Third.*—Upon the refusal of a new trial.

The question involved in this motion, and not already adverted to, was upon the admission of certain evidence in reference to the occupation of the defendant, and those joined in the indictment with him. As the evidence is not all in the record, we are not at all informed as to the connection in which that objected to was offered; and as we can readily see that a state of facts might have existed making the evidence admissible for some purposes, we will presume in favor of the ruling, in the absence of the purpose thereof, &c., appearing in the record.

The last error assigned is upon the ruling, on the motion to arrest the judgment.

The answer to this is, that no such motion appears to have been made.

*Per Curiam.*—The judgment is affirmed with costs.

*S. C. Willson* and *J. E. McDonald*, for the appellant.

*W. P. Fishback*, for the state.

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GRIGGS v. VICKROY.

APPEAL from the *Delaware* Circuit Court.

*Per Curiam.*—This was an action by *Vickroy* against

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MORGAN  
v.  
MONT-  
GOMERY.

*Griggs*, for words spoken, which are averred to charge incest, and to be, therefore, slanderous.

The various sets of words laid in the complaint, as having been spoken, contain substantially a charge that there had been, before that time, illicit, carnal intercourse between *Vickroy* and his daughter, naming her. There is no averment that *Vickroy* had any knowledge of the relationship that existed between him and the female.

The demurrer which was filed to the complaint, should have been sustained. *Lumpkins v. Justice*, 1 Ind. R. 560.

The judgment is reversed with costs. Cause remanded, &c.

*W. Marsh* and *W. Brotherton*, for the appellant.

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MORGAN v. MONTGOMERY.

Thursday,  
June 23.

APPEAL from the *Ohio* Court of Common Pleas.

*Per Curiam*.—But one point is presented to the Court in this case, by the brief of appellant, and that is upon the ruling of the Court in suppressing a deposition. The deposition was suppressed at the *January* term, 1857. A motion was then made, founded upon the affidavit of the defendant filed at the previous term, and upon the suppressed deposition, to continue the cause. The continuance was granted.

The record does not contain the affidavit alluded to, but from the connection in which it is mentioned, the presumption would, perhaps, arise, that the affidavit had reference to the necessity of obtaining the testimony of the witness named in the deposition, &c.

The record does not show that, at the next term, any action was had in regard to the deposition, nor that any motion was made to further continue; nor does it contain the evidence which was given upon the trial, which was



had at that term. Whether the witness, whose deposition had been suppressed, testified upon the trial, or whether the same facts contained in his deposition, were before the jury from other witnesses, does not appear. There was no motion for a new trial. Under these circumstances, we see no error in the record.

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1859.

THE NEW  
ALBANY, &c.,  
RAILROAD CO.  
v.  
O'DAILY.

The judgment is affirmed with 5 per cent. damages and costs.

*D. S. Major*, for the appellant.

*W. S. Holman*, for the appellee.

ALDRICH v. MINARD.

APPEAL from the *Warren* Circuit Court.

Thursday,  
June 23.

*Per Curiam*.—A judgment was confessed upon a complaint, note, and warrant of attorney.

12a 551  
141 573

The appearance and confession was by an attorney. No affidavit of the party confessing, accompanied, and was filed with, the warrant of attorney. 2 R. S. pp. 123, 124.

The proceeding was erroneous. *McPheeters v. Campbell*, 5 Ind. R. 109.

The judgment is reversed with costs. Cause remanded, &c.

*D. D. Pratt*, for the appellant.

*H. P. Biddle*, for the appellee.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
O'DAILY and Wife.

12b 551  
155 28

APPEAL from the *Tiptecanoe* Circuit Court.

Thursday,  
June 23.

PERKINS, J.—This was a complaint for an injunction



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THE INDIAN-  
APOLIS, &c.,  
RAILROAD CO.  
v.  
McAHREN.

and a writ of assessment of damages against *The New Albany and Salem Railroad Company*, because said company was proceeding to lay a track of their road along a certain street in the city of *Lafayette*, in front of the lot of the plaintiff. An injunction was granted, &c.

A railroad in a city is not, necessarily, a nuisance, and the injunction cannot be sustained on that ground. Ang. on Highw., p. 217. See *Wood v. Mears*, at this term (1). And so far as the suit was to obtain compensation for damages by a statutory writ of assessment, it must fail, because the appropriation of a public street to the use of a railroad, is not a taking of the private property of the owners of adjoining lots, within the meaning of the statute giving that remedy. The action must be one for damages for an injury as at common law, if one lies at all. *The Indiana, &c., Co. v. Boden*, 10 Ind. R. 96.—*Protzman v. The Indianapolis, &c., Railroad Co.*, 9 *id.* 467.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded to be dismissed.

*H. W. Chase, J. A. Wilstach, S. C. Willson, and J. E. McDonald*, for the appellants.

(1) *Ante*, 515.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.  
McAHREN.

Thursday,  
June 23.

APPEAL from the *Decatur* Court of Common Pleas.

*Per Curiam*.—Suit by *McAhren* for animals killed by the cars, &c., of the company, commenced before a justice, where a demurrer was filed to the complaint and overruled; judgment for plaintiff. On appeal, no action appears to have been taken by the Common Pleas upon the demurrer; but a trial was had, and judgment for plaintiff.

It is insisted that the failure to take action upon the de-



murrer, was an error that should reverse the case. After the demurrer was overruled before the justice, a trial was had upon issues of fact, which the statute put in. Upon the appeal, the party demurring did not see proper to again bring forward the question upon the demurrer, but went to trial upon the issues of fact. We think this operated as a waiver of any right which he had, to have the demurrer determined. See *The Indianapolis, &c., Railroad Co. v. Paramore*, at this term (1).

The questions, other than the above, made in the case, are settled in the case of the same appellants v. *Townsend*, 10 Ind. R. 38, and *The New Albany, &c., Railroad Co. v. Maiden*, at this term (2).

The judgment is affirmed with 10 per cent. damages and costs.

*J. S. Scobey* and *W. Cumback*, for the appellants.

*O. B. Hord* and *J. Gavin*, for the appellee.

(1) *Ante*, 406.

(2) *Ante*, 10.

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#### HOLMAN v. MARTIN.

A resident householder cannot claim land as exempt from sale upon execution, the title to which is in his wife.

Nor can he avail himself of his own fraud in having the land conveyed to her, to enable him to set up such exemption.

The question of the validity of the conveyance to the wife, arises between her and the creditors of the husband; and the question being one of fact, it would be for a jury, or the Court sitting as a jury, to determine it; and a verdict, in such cases, if not clearly wrong, will not be disturbed by this Court.

APPEAL from the *Dearborn* Circuit Court.

Thursday,  
June 23.

*Per Curiam*.—This was a suit by the appellant against the appellee, to recover a tract of land. Trial by the Court; judgment for the defendant.

12	662
132	365
133	501

12	559
154	171



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1859.

HOLMAN  
v.  
MARTIN.

The first question is, upon the right of the defendant to claim the property as exempt from execution; and the second, whether a conveyance of the land to the wife of the defendant was fraudulent.

The defendant was living on the property. He had but little personal property. The land was conveyed to his wife, by the person from whom it was purchased, on the 1st of *December*, 1856. At that time he was indebted, and afterwards, to-wit, in *March*, 1857, a judgment was rendered against him, upon which an execution was issued, in favor of *Holman*, upon which he purchased the land. The defendant claimed that it ought not to be sold on the execution, because 90 dollars of it belonged to his wife, and he claimed the balance under the exemption law. Afterwards, and whilst the sheriff was offering the land for sale, the defendant withdrew the claim of his wife, and claimed the said property under the exemption law. The sheriff disregarded the claim, and sold the property to the plaintiff.

Upon this state of facts the question of the validity of the sale, &c., arises.

The defendant could not claim the property under the exemption law; for the statute is, "That an amount of property not exceeding in value 300 dollars, owned by any resident householder, shall not be liable," &c. Here it was shown that the title to the property was not in the defendant, but in his wife. Whether there had been fraud in the transaction by which he had caused the title to be so vested in her, is a question he cannot raise. In other words, the law will not permit him to say that he was guilty of a fraud, and, therefore, he will, of his own volition, set aside the contract, reclaim the title, and insist upon retaining the property as exempt from sale, &c. *Mandlove v. Burton*, 1 Ind. R. 39.

The question of the validity of the conveyance to his wife, arises between her and the creditors of the husband. She was not made a party to this suit. To have enabled the Court to have found that the conveyance to her was void, the question, which is, by the statute, made one of



fact, as to whether the transaction was a fraudulent one, would have to be determined by the jury, or the Court sitting as a jury. Keeping in view the line of decisions which this Court has for a long time followed, upon the subject of disturbing findings and verdicts upon questions of fact, we cannot disturb this, although our inclination might have been different from the judge who heard the evidence.

May Term,  
1859.

HOLMES  
v.  
WELCH.

The judgment is affirmed with costs.

*W. S. Holman*, for the appellant.

*D. S. Major*, for the appellee.

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HOLMES and Another v. WELCH.

APPEAL from the *Huntington* Court of Common Pleas. Thursday,  
June 23.

*Per Curiam*.—Action by the appellants against the appellee, on an account for goods sold and delivered, viz., brandies and whiskies.

The defendant answered, admitting that on the 15th of *February*, 1856, he purchased from the plaintiffs the bill of liquors, in the state of *Indiana*; that the same were intoxicating liquors, and were not sold to him for medical, chemical, mechanical, or sacramental purposes. A counter-claim was also set up for money paid by the defendant to the plaintiffs for liquors thus sold by plaintiffs to the defendant.

The plaintiffs demurred to this defense; but the demurrer was overruled, and the plaintiffs excepted. Judgment for the defendant.

The demurrer should have been sustained. It has been determined that, at the time of the sale in question, there was no law in force in the state, prohibiting or regulating the sale of intoxicating liquors. *Meshmeier v. The State*, 11 Ind. R. 482.



May Term, The judgment is reversed with costs. Cause remanded  
 1859. for further proceedings.  
 BLACKMAN *J. De Long, D. O. Dailey, H. C. Newcomb, and J. S.*  
 v. *Harvey*, for the appellants.  
 THE STATE.

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BLACKMAN v. THE STATE.

A complaint on a forfeited recognizance taken by a sheriff, not showing any authority in the officer to take the recognizance, is defective.

A sheriff has not such authority merely because he is sheriff. It is only where the party to be recognized is in his custody on legal process, that he has such authority.

An answer to such a complaint, averring that the person who took the recognizance was not sheriff, &c., and had no authority to take the same, is sufficient on demurrer.

The acts of a sheriff *de facto*, under color of office, are valid, although his right to the office be in dispute, and although it should turn out that he is not entitled to it.

Thursday,  
 June 23.

APPEAL from the *Noble* Circuit Court.

WORDEN, J.—Complaint by the state against *Blackman*, on a forfeited recognizance. The recognizance, a copy of which is set out, appears to have been entered into before *Isaac Swartwout*, sheriff of *Noble* county, *Indiana*, on the 3d day of *October*, 1857, by *William H. Blackman* and *Elisha Blackman*, and is conditioned for the appearance of said *William H.* at the next term of the *Noble* Circuit Court, to answer to a charge of forgery. Averment of the non-appearance of *William H.*, and the forfeiture of the recognizance.

*Elisha*, on whom alone process was served, answered "that the supposed recognizance was not taken by any person by law authorized to take and approve the same; that said *Swartwout*, before whom the same purports to have been taken and approved, was not, at the time, the sheriff of said county of *Noble*, and had no authority to take and approve said recognizance, by reason whereof the same is void."

12	556
133	300
12	556
137	217
12	556
150	462



A demurrer to this answer was sustained, and final judgment rendered for the state. Exception having been taken to the ruling on the demurrer, the same is here assigned for error.

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1859.

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BLACKMAN  
v.  
THE STATE.

The complaint is perhaps defective in not showing any facts authorizing the sheriff to take the recognizance in question. It is not averred in the complaint, nor does it appear by the recognizance itself, a copy of which is set out, that the sheriff had any warrant or process for the arrest of said *William H. Blackman*; nor does any authority whatever appear for taking the recognizance. A sheriff has no authority, simply because he is a sheriff, to take and approve such recognizance. It is only where the party to be recognized is in his custody by legal process, that a sheriff is authorized to take a recognizance.

The answer, we think, was sufficient. It avers that *Swartwout* was not the sheriff of *Noble* county, and had no authority to take the recognizance.

The objection pointed out by the demurrer is, that the answer does not aver that *Swartwout*, at the time, &c., was not acting as the sheriff of *Noble* county. The answer, we think, is equivalent to an allegation that *Swartwout* was not sheriff, either *de facto* or *de jure*. If he was acting as sheriff in fact, under color of office, his acts would be valid, although his right to the office might be in dispute, and although it might turn out that he was not entitled to the office at all. But in such case we think the state should have taken issue on the allegations in the answer; and if, on the trial, it appeared that *Swartwout* was acting as sheriff under color of office, that would have been sufficient to sustain the recognizance, and if not, the recognizance would appear to have been taken by a mere usurper, without color of authority, and would be void.

The demurrer to the answer should have been overruled.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*A. Ellison*, for the appellant.



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1859.

ADAMS  
v.  
BROWN.

Thursday,  
June 23.

COULSON v. THE BOARD OF COMMISSIONERS OF CASS  
COUNTY.

APPEAL from the *Cass* Court of Common Pleas.

*Per Curiam*.—Suit by the appellees against the appellant, on a note for 300 dollars, dated *January* 4, 1856.

Defense, that the note was given for liquors sold contrary to law. Demurrer to answer sustained, and final judgment for the plaintiff. This was right, as has been decided in the case of *Holmes v. Welch*, at the present term (1).

It is urged that the amount recovered was too much, and it appears to have been about 50 cents more than was due at the time judgment was rendered; but for this trifling error in the computation, the judgment will not be reversed.

The judgment is affirmed with 3 per cent. damages and costs.

*D. D. Dykeman* and *H. P. Biddle*, for the appellant.

*D. D. Pratt*, for the appellees.

(1) *Ante*, 555.

ADAMS and Others v. BROWN and Another.

Thursday,  
June 23.

APPEAL from the *Lagrange* Court of Common Pleas.

*Per Curiam*.—Judgment by default.

The only error complained of is, as to the sufficiency of the service. The writ was returned "served by reading" as to two of the defendants, and "by copy," as to the other. If there was any defect as to the service or return, a motion should have been made in the Court below to set aside the default. *Blair v. Davis*, 9 Ind. R. 236.—*Hol-singer v. Robinson*, 11 *id.* 439. This was not done.



The judgment is affirmed with 10 per cent. damages and costs. May Term,  
1859.

*J. M. Flagg*, for the appellants.

*A. Ellison*, for the appellees.

FULLER  
v.  
ADAMS.

### SANGSTER v. GRINER.

APPEAL from the *Fountain* Circuit Court.

*Thursday,  
June 23.*

*Per Curiam*.—In this case there are no errors assigned, for which reason the appeal must be dismissed. The judgment below is so clearly right, that were the cause properly before us, it would be affirmed with damages. But there being nothing before us, for the want of an assignment of errors, we can only dismiss the appeal.

The appeal is dismissed with costs.

*D. W. Voorhees*, for the appellant.

*C. Tyler*, for the appellee.

### FULLER and Others v. ADAMS.

APPEAL from the *Lagrange* Circuit Court.

*Thursday,  
June 23.*

WORDEN, J.—Suit by *Adams* against *Fuller* and others on a bond, by which the defendants became bound to pay certain debts, in consideration of the sale by *Adams* to *Fuller* of his interest in a certain partnership between them.

While the cause was pending, on affidavit of the plaintiff, the Court made an order appointing a receiver to collect and receive the partnership effects.

From this order, the cause not having been finally disposed of, *Fuller* appeals to this Court.



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1859.

THE NEW  
ALBANY, &C.,  
RAILROAD CO.  
V.  
BEELER.

This is not a "final judgment" from which an appeal lies to this Court, under § 550, 2 R. S. p. 158; nor is it such an interlocutory order as may be appealed from under § 576. The first specification of this section contemplates "the delivery or assignment of any securities, evidences of debt, documents, or things in action", to a party, and not to a receiver who may be appointed to receive effects to be disposed of on the final disposition of the cause. *Wood v. Brewer*, 9 Ind. R. 86.

From the order in question, no appeal lies to this Court.

*Per Curiam*.—The appeal is dismissed with costs.

*A. Ellison*, for the appellants.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
BEELER.

Thursday,  
June 23.

APPEAL from the *Washington* Circuit Court.

*Per Curiam*.—Action commenced before a justice of the peace by the appellee against the appellants to recover damages for the killing of stock by the defendants, at a place where their road was not fenced, the plaintiff not owning the land adjoining the road, where the animals were killed. On appeal to the Circuit Court, the plaintiff recovered, and the defendants appeal to this Court.

The question argued by counsel in this cause has already been determined against the appellants. *The Indianapolis, &c., Railroad Co. v. Townsend*, 10 Ind. R. 38.

The judgment is affirmed with 5 per cent. damages and costs.

*W. G. Cooper*, for the appellants.

*C. L. Dunham* and *H. Heffren*, for the appellee.



VAUGHN v. DAYTON.

May Term,  
1859.WILLIAMS  
v.  
JONES.Thursday,  
June 23.APPEAL from the *Lagrange* Court of Common Pleas.

*Per Curiam*.—Action by the appellee against the appellant, to recover damages for an alleged obstruction of a public street or highway. The pleadings put in issue the existence of the alleged street.

Trial by jury; verdict and judgment for the plaintiff.

The title of a railroad company to run her road over land, as also the easement of a public highway, have been held such a title to real estate as could not be tried in the Common Pleas, for want of jurisdiction. *The President, &c., of the Cincinnati, &c., Railroad Co. v. Sipe*, 11 Ind. R. 67.—*Timmons v. Switzer*, *id.* 363.

This case falls within those cited, on the authority of which the judgment must be reversed.

The judgment is reversed with costs. Cause remanded, &c.

A. Ellison, for the appellant.

J. M. Flagg, for the appellee.

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WILLIAMS v. JONES and Others.

Parol evidence is not admissible, in the first instance, to prove the receipt of a judgment. If the receipt be upon the record, the record, or a transcript of it, must be produced. If it be upon a separate paper, and delivered to the opposite party in the suit, notice must be given to him to produce it on the trial, and upon his failure to do so, the contents of it may be proved by parol.

In a suit upon an agreement to deliver a certain amount in cash notes, the value of the notes, as found by the jury, and not the amount stated in the agreement, is the measure of damages.

APPEAL from the *Madison* Court of Common Pleas.

PERKINS, J.—Suit upon the following agreement:

“\$900. On or before the 1st day of *April* next, I promiseSaturday,  
June 23.



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1859.

WILLIAMS  
V.  
JONES.

to assign over and indorse to *Jones Brothers & Co.*, 900 dollars in cash notes, drawing 6 per cent. interest, on good, solvent men, resident in *Madison* county, *Indiana*, all waiving relief from valuation laws of said state, and then due, in consideration of their receipting to *Oran Carver* full payment of the judgment which they recovered against him in the District Court of the *United States* for the district of *Indiana*, at the *May* term thereof, 1855, and surrendering up to me the notes which they hold as collaterals, executed by *John Harris* to said *Carver*. *R. W. Williams*. December 22, 1855."

The complaint averred that the receipt was executed and the collaterals delivered, but that the notes were not assigned over.

Answer, denying the execution of the receipt and the delivery of the collaterals.

On the trial, the Court permitted parol evidence of the receipt. This was error. If the receipt was upon the record of the judgment, the record, or a transcript of it, should have been produced. If the receipt was not upon the record, but was upon a separate paper, and delivered to the defendant, notice should have been given to him to produce it on the trial, and on his failure to do so, the contents might have been proved by parol.

In the assessment of damages, the Court held that they should be for the sum expressed on the face of the written agreement. According to the case of *Parks v. Marshall*, 10 Ind. R. 20, and the authorities there cited, the value of the notes to be assigned, as found by a jury, would be the measure of damages.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for another trial.

*W. R. Pierse*, for the appellant.

*M. S. Robinson*, for the appellees.



FISH and Another v. SMITH.

May Term,  
1859.FRANCIS  
v.  
WARREN.APPEAL from the *Tipton* Court of Common Pleas.

PERKINS, J.—Suit for fraud and breach of warranty in the sale of a horse. Answer in denial. Jury trial. Judgment for the defendant. *Saturday, June 25.*

There is but one point in the case. After the jury had retired to their room to consult of their verdict, they sent to the judge information that they desired instruction upon a point. Instead of calling the jury back to the Court-room, and instructing them in the presence of the parties, the judge, without, it is admitted, intending any wrong, went into their room and gave them instructions in the absence of the parties, and without their consent. This is a practice not to be tolerated. It is an error for which the case must be reversed. How, under our practice, where exceptions must be taken at the time an act is done, can the parties avail themselves of this right, if the judge, at his pleasure, can instruct the jury in private? This is sufficient reason to condemn the practice, aside from its intrinsic impropriety. *Hall v. The State*, 8 Ind. R. 439, and note 2.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for another trial.

*J. A. Lewis and J. Green*, for the appellants.

FRANCIS v. WARREN and Another.

APPEAL from the *Montgomery* Court of Common Pleas. *Saturday, June 25.*

*Per Curiam*.—The complaint alleges that *Warren and Burk*, on the 24th of *August*, 1857, put into the hands of *Francis*, who was the defendant, 400 dollars, to buy hogs for them, at 5 dollars per hundred weight gross, if they



May Term,  
1859.

FRANCIS  
v.  
WARREN.

could be had at that price, and if not, the defendant was to refund the money; that at the time he received the money, he executed a receipt, which was filed with the complaint, and reads thus:

"August 24, 1857. Received of *Levin Warren* and *Robert Burk* 400 dollars, for to buy hogs with, at 5 dollars gross, if I can get them; if not, I refund the money. *Elias Francis*."

It is averred that the defendant never furnished or delivered to the plaintiffs any hogs, in performance of his undertaking, but excused himself from such performance by asserting that he could not buy hogs at the price stipulated, and on the 29th of *September*, 1857, refunded 245 dollars, 50 cents, of said 400 dollars, leaving a balance of 154 dollars, 50 cents, which he refuses to refund, &c.

Defendant, in his answer, says "he bought 145 dollars, 50 cents' worth of hogs for the plaintiffs, and had them ready to deliver, on his farm in *Montgomery* county, on the 29th of *September*, 1857, at 5 dollars per hundred weight gross, in part performance of said contract, and still has them on said farm, ready to be delivered to the plaintiffs, and he offered so to deliver them on that day; but the plaintiffs refused to receive them; and, further, that the plaintiffs and defendant then and there, in consideration of the refunding of the balance of said 400 dollars, as alleged in the complaint, rescinded the contract so far as he was bound thereby to purchase the residue of said hogs—he, the defendant, having executed and performed that part of the contract which was not rescinded by agreement of the parties, by purchasing the hogs, now on his farm, for the plaintiffs."

Demurrer to the answer sustained, and final judgment for the plaintiffs.

This defense is inaccurate in point of form; but as we understand it, the defendant, on the 29th of *September*, 1857, refunded 245 dollars, 50 cents, to the plaintiffs, and that the parties then, in consideration of such refunding, rescinded the contract for the delivery of the hogs as to that amount; that for the residue of the 400 dollars by them



advanced, he had bought 154 dollars, 50 cents' worth of hogs, which were then on his farm in *Montgomery* county, and which he then offered to deliver to the plaintiffs, in full execution of that part of the contract not rescinded; but that they refused to receive them, and he still has them ready on his farm, &c. This, it seems to us, was a valid defense. The parties had a perfect right to change or modify their contract in respect to the purchase and delivery of the hogs; and we think they have, in this instance, done so, upon a consideration which the law deems sufficient, viz., the refunding of the 245 dollars, 50 cents. The demurrer should have been overruled.

The judgment is reversed with costs. Cause remanded, &c.

*I. Naylor*, for the appellant.

May Term,  
1859.  
COFFEY  
v.  
COLLIER.

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COFFEY v. COLLIER and Another.

APPEAL from the *Morgan* Court of Common Pleas. *Saturday, June 25.*

*Per Curiam.*—*Coffey* sued *Richard* and *Joel Collier* before a justice of the peace, upon a promissory note for the payment of 22 dollars. The justice gave judgment for the plaintiff, and the defendants appealed. In the Common Pleas, they moved to dismiss the cause, on the ground that the plaintiff had not, when he commenced his suit before the justice (he being a non-resident of the county in which it was commenced), given security for costs. Pending this motion, the plaintiff offered to give such security; but his offer was refused. The defendants' motion was sustained, and the cause dismissed, &c.

The code says, justices shall require security for costs from plaintiffs living out of the county. 2 R. S. p. 460, § 55. But here, the record, though it shows that the defendants appeared before the justice, and contested the plaintiff's suit, fails to show that they even suggested his



May Term, 1859. non-residency. And the defendants having appealed, the cause must be considered in the Common Pleas *de novo*.

HOLCOMB v. McDONALD. And the result is, that security for costs could not be required in that Court, unless the plaintiff was a non-resident of the state. *Id.* pp. 127, 463, §§ 402, 67.

The judgment is reversed with costs. Cause remanded, &c.

*J. W. Gordon* and *O. J. Glisner*, for the appellant.

*A. A. Barrickman*, for the appellees.

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#### HOLCOMB v. McDONALD.

If a defendant in a suit before a justice of the peace, appear and answer, and afterwards refuse to defend further, on the ground that he is not a resident of the county, letting his appearance stand, the justice must proceed with the cause; and if judgment be rendered against him, and he appeal and reduce the judgment five dollars or more, he will be regarded as having appeared in both Courts, and the costs in the appellate Court must go against the plaintiff.

Saturday,  
June 25.

APPEAL from the *Warrick* Court of Common Pleas.

DAVISON, J.—*Holcomb* sued *McDonald* before a justice of the peace. The parties appeared. To the complaint, the defendant filed his answer, setting up an offset against the plaintiff's demand. Reply in denial of the answer. There was a trial, which resulted in a judgment in favor of the plaintiff for 8 dollars. At the proper time, the plaintiff moved for a new trial. His motion was sustained, and a new trial granted. Upon the day fixed for the new trial, both parties appeared before the justice. And the defendant objected to the sufficiency of the notice of the new trial; but his motion was overruled. And thereupon he refused to defend, on the ground that he was not a resident of *Warrick* county. After this, the trial proceeded; but it does not appear that the defendant took any further part in the proceedings. One witness was examined, and final



judgment rendered against defendant for 25 dollars, from which he appealed. In the Common Pleas, the cause was tried by the Court, who rendered a judgment in favor of the plaintiff for 15 dollars, and against him for costs.

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The error assigned, relates alone to the judgment against the plaintiff for costs. The statute says: "If either party against whom judgment has been rendered appeal, and reduce the judgment against him five dollars or more, he shall recover his costs in the Common Pleas or Circuit Court, when the appellant appeared before the justice." 2 R. S. p. 464, § 70.

In this case, the judgment was reduced more than five dollars. But it is contended that *McDonald*, the appellant in the Common Pleas, did not appear before the justice. We think otherwise. He appeared and answered; and the record fails to show that he ever withdrew his appearance. The mere fact that he refused to defend, while he suffered his appearance and pleadings to stand, would not have authorized a judgment by default or *nil dicit*. Hence, the justice could not do otherwise than proceed in the trial of the cause. He must, therefore, be regarded as having appeared at both trials; and the result is, there is no error in the judgment of the Common Pleas.

*Per Curiam*.—The judgment is affirmed with costs.

*J. G. Jones* and *J. E. Blythe*, for the appellant.

*J. Lockhart*, for the appellee.

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### HUBLER and Another v. PULLEN and Others.

Suit by the assignees against the acceptors of a bill of exchange payable at a bank in *Indiana*. Answer, that the bill was given in consideration of a quantity of pig iron, which was warranted to be of a certain quality; that it was not of the quality warranted; that the assignees knew the consideration of the bill; and that they were agents of the payees of the bill. Demurrer sustained on the ground that by § 81, 2 R. S. p. 44, the law merchant is so changed that no defense can be set up to a bill payable at a bank, against a *mala fide* assignee.



May Term, 1859. *Held*, 1. That the section referred to simply enacts the rule of the law merchant, and is applicable to *bona fide* assignees.

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2. But that the demurrer was correctly sustained, because of the indefiniteness of the answer.

Saturday,  
June 25.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—Suit by the assignees against the acceptors of a bill of exchange payable at a bank in *Indiana*.

Answer, that the bill was given in consideration of the sale of a quantity of pig iron, which was warranted to be of a certain quality; that it was not of the quality warranted; that the assignees knew the consideration of the bill, and further, that they were the agents of the assignors.

Demurrer to this answer sustained, and final judgment for the plaintiffs.

The demurrer was sustained on the ground that § 81, 2 R. S. p. 44, had so changed the law merchant in this state, that no defense could be set up to a note payable at bank, against a *mala fide* assignee.

This ground, we think, was erroneous. We construe the section quoted, as simply enacting the rule of the law merchant, and to be applicable to *bona fide* assignees.

But we think the demurrer was rightly sustained on another ground, viz., indefiniteness of the answer.

The plaintiffs, it must be observed, are the assignees by indorsement, and are thus the legal holders of the bill.

The answer sets up two grounds of defense—

1. That the plaintiffs are the agents of the assignors, the payees of the bill, and, hence, have not the equitable interest.

But this allegation is too vague to defeat the suit on this ground. It does not aver that the plaintiffs are the agents of the payees in the collection of this bill. They may be agents for them in their general business, and this bill may have been assigned to them, nevertheless, for a valuable consideration. They may have purchased it, or taken it in payment for their services.

An answer, to defeat the suit of the legal holder, on the ground of want of interest, must be certain.



2. Another ground of defense is, notice of the true character of the bill. May Term,  
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It does not follow, as will be manifest from what we have said, that the plaintiffs necessarily had this knowledge, simply because they were agents of the payees. And aside from the allegation of that fact, the answer asserts only that they knew that the bill was given for iron sold upon a warranty. It does not aver that they had any knowledge that the iron delivered did not fill the warranty. And, as the bill was assigned before due, we think, not without some hesitation, we admit, that that allegation is not sufficient to show that they were not *bona fide* holders. See *Goddard v. Lyman*, 14 Pick. 268, and Byles on Bills, top p. 181, note.

If the indorsees had had notice of the breach, as well as of the warranty, the case would have fallen within *Moses v. Mead*, 1 Denio, 378.

*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*G. A. Wood* and *D. P. Vinton*, for the appellants.

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### WALDO v WALLACE.

In determining whether or not an office is judicial in its character, within the meaning of § 16, art. 7, of the constitution, the Courts will, where the statute is not clear upon the point, look to the jurisdiction and duties of the officer. The mayor of a city, organized under the general law of 1857, is a judicial officer, within the meaning of that constitutional provision, if at the time of his election no order had been made by the city council for the election of a city judge, and no such judge had been elected.

The executive and administrative duties of the mayor of a city, under the act of 1857, are not within the executive and administrative departments of the state government, as established by the constitution. In respect to such duties, the mayor is merely an officer of a municipal corporation; and he may discharge such duties and his judicial functions at the same time, without violating § 1 of art. 3 of the constitution.

The judicial duties of the mayor are not incidental to his municipal office, but

19	569
136	569
12	569
137	490
19	569
145	308
12	569
149	188
12	569
161	233
161	234
161	235
161	239
12	569
168	517



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separate and independent of it; for he is clothed, in this respect, with general power to administer, judicially, the laws of the state.

The statute conferring judicial powers upon the mayor of a city, is not unconstitutional.

The mayor of a city, under the act of 1857, when acting as such, is not a state officer; and in acting both as mayor and city judge, he acts in two capacities. Thus, the same act may, on the same day, be punished by him once as mayor, acting for the city, and once as judge, for a violation of the laws of the state; and one of these prosecutions will be no bar to the other. PERKINS, J.

And though he would act in two capacities or offices, but one of them would be an office under the state. PERKINS, J.

A Court is a tribunal charged with a substantive duty—the exercise of judicial power; and a judicial officer is the person appointed to exercise that power. PERKINS, J.

A judge will be not the less a judicial officer because some duties he may have to perform are administrative in their character; nor will an administrative officer become a judicial officer simply because some of his duties may be, to some extent, judicial in their character. PERKINS, J.

The duties of a mayor, as a state officer, are entirely judicial; and they are continuous for his official term, and are discharged in the form and with the effect of proceedings in the other Courts of the state. PERKINS, J.

A mayor being a judicial officer of the state, elected in a manner which, under the unrestricted power of creating Courts conferred by the constitution, the legislature might adopt, he is ineligible to any office other than a judicial one, during the term for which he is elected. PERKINS, J.

Saturday,  
June 25.

APPEAL from the *Marion* Circuit Court.

HANNA, J.—The city of *Indianapolis* is incorporated under the general law for the incorporation of cities, approved *March 9, 1857*. [Acts of 1857, p. 42.] At the municipal election in *May* of that year, *Wallace* was elected mayor for the term of two years.

The common council had not ordered the election of a city judge, as they were authorized to do by § 9 of that act. In the absence of such order and election, it is enacted by § 18, among other things, that “He [the mayor] shall hold a city Court every day, *Sundays* excepted, at, &c.; whilst sitting as such Court, he shall have exclusive jurisdiction of all prosecutions for violation of the by-laws and ordinances of the city and township in which such city is situated; he shall have, within the limits of said city, the jurisdiction and powers of a justice of the peace, in all matters civil and criminal arising under the laws of this state, and for crimes and misdemeanors his jurisdiction shall be co-



extensive with the county in which such city is situated: *provided*, that in trials before him, he shall have power to adjudge imprisonment as a part of his sentence, not exceeding thirty days in the city or county prison. In all [indictments] in the city judge or mayor's Court, either party may have a trial by jury, and a change of venue to a justice of the peace in such city, and appeal to a Court of competent jurisdiction, under the same restriction, and in the same manner, as in a justice's Court; except in cases where the mayor has exclusive jurisdiction, no change of venue shall be allowed. The same rules of pleadings and practice shall be observed in the city or mayor's Court that are in justices' Courts. \* \* \* All fines and penalties collected by him shall be paid into the city treasury, except when otherwise directed by acts prescribing the duties and powers of justices of the peace. If the common council shall deem it expedient for the interests of such city to cause a judge to be elected, the same may be done at any general election at which the mayor shall also be elected, and such city judge shall give the like bond as the mayor is herein required to give, and he shall, from and after his due qualification, perform all the judicial duties herein required to be performed by the mayor."

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*Wallace* took upon himself the duties of the office of mayor—among others, those of a judicial character above set forth.

Within the two years for which he was elected mayor, he resigned that office and was a candidate, and received the greatest number of votes, for the office of sheriff of *Marion* county. This proceeding was commenced by *Waldo*, to test the question of his eligibility to the latter office, under § 16, of art. 7 of the constitution of *Indiana*, [which reads thus]: "No person elected to any judicial office, shall, during the term for which he shall have been elected; be eligible to any office of trust or profit under the state, other than a judicial office."

Was the office of mayor of the city of *Indianapolis*, during the term for which *Wallace* was elected, a judicial



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We say during that term, because it is not pretended but that the common council, by ordering the election of a city judge, for any succeeding term, might take from the office of mayor all duties, and divest that officer of all powers, of a judicial character. But it is averred that such order had not been made preceding the election for that term; that after the election of *Wallace*, he took upon himself the executive, ministerial, and judicial duties of the office, so far as they were devolved upon him by the act above referred to.

What is a judicial office, and who are judicial officers, who are thus, for a time, prohibited from seeking certain other official stations?

An office is a particular duty, charge, or trust, conferred by public authority, and for a public purpose. Offices are civil, judicial, ministerial, executive, political, municipal, diplomatic, military, ecclesiastical, &c. See Webster's Dict., *h. v.*

An office is a right to exercise a public function or employment, and may be classed into civil and military. And civil may be classed into political, judicial, and ministerial. Political, are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer. Judicial, are those which relate to the administration of justice. Ministerial, are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior. It is a general rule, that a judicial office cannot be exercised by deputy, while a ministerial may. 2 Bouv. Law Dict. 259.—4 Jacob's Law Dict. 433.—2 Toml. Law Dict. 665.

JUDICIAL.—Belonging, or emanating from a judge, as such. 1 Bouv. Law Dict. 681. Pertaining to Courts of justice. Webster's Dict. Belonging to a cause, trial, or judgment. Bailey's Dict.

By our state constitution, "The powers of the govern-



ment are divided into three separate departments, the legislative, the executive, including the administrative, and the judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this constitution expressly provided." Art. 3, § 1.

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Article 4, treats of the legislative power; article 5, of the executive; article 6, of the administrative power; article 7, of the judicial, as follows:

"Sec. 1. The judicial power of the state shall be vested in a Supreme Court, in Circuit Courts, and in such inferior Courts as the General Assembly may establish."

Thus, by the constitution, the office of supreme judge is made a judicial office, although the jurisdiction of that Court is, by § 4 of the same article, made to depend much upon the legislative will. For that Court has no original jurisdiction, except it be conferred by the legislative power, and the same power might throw around appeals and writs of error such regulations and restrictions as would place but comparatively little business before that Court of last resort under the state government.

So, the office of circuit judge is, in like manner, made a judicial office by the constitution; but to what extent that officer shall have either civil or criminal jurisdiction, depends entirely upon the legislative department. The jurisdiction, civil and criminal, might be so extended as to over burden the officer with business, or the place might be made a mere sinecure; but if made so, it would still be a judicial office, but without prescribed duties attached thereto.

The number, style, and jurisdiction of the inferior Courts, depend upon the action of the General Assembly, as does the number of judges, or judicial officers, by whatever name they may be designated, who shall, in such inferior Courts, judicially administer the law.

The extent of jurisdiction that may be vested in one of those inferior tribunals, whether more or less, does not, therefore, determine the question whether the officer who may hold such Court, or preside at such tribunal during the judicial administration of the law, within the pre-



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scribed jurisdiction, is a judicial officer, and the office a judicial office. The true question appears to us to be—Is this office a part of the system established by the General Assembly, under the constitution, to sustain the government therein provided for, by the judicial administration of the laws of the state and of justice? The duties performed by the officer, or the jurisdiction appertaining to the office, may be looked to to determine, in a case where it is not made clear by the constitution or the statute, the inquiry as to whether a particular office is a judicial office or not.

We suppose it would be within the power of the General Assembly, by distinct and separate acts, to create an inferior Court in each county, provide for the election of the judge thereof, fix his compensation, and prescribe his duties and the jurisdiction of such Court. Now, suppose a series of bills were introduced into the General Assembly to carry out such a purpose, and they should all pass into laws except the last named, showing upon their face that the Court thus established was an inferior Court, such as contemplated and embraced by § 1, art. 7, of the constitution; would not the judges elected under these acts, but without their jurisdiction and duties being fixed, be as much judicial officers as circuit judges without prescribed duties? We think they would. We look, then, only to the jurisdiction of a Court or officer, and the duties of the incumbent, for the purpose of arriving at a correct conclusion, as before stated, in the absence of positive enactment in that respect, as to whether the office falls within the constitutional provision.

In the case at bar, the mayor had the same jurisdiction as a justice of the peace, with the additional power to imprison, as a part of the punishment, for offenses against the law. Let us for a moment look to the jurisdiction of that officer. Although, by the constitution, the office, and duration of the term, of justices of the peace, are provided for, yet their powers and duties were to be fixed by law. "A competent number of justices of the peace shall be elected by the voters in each township in the several coun-



ties. They shall continue in office four years, and their powers and duties shall be prescribed by law." Const. art. 7, § 14. Whether the framers of this section had in view the office of justice of the peace, as it anciently existed under the *English* government, where the incumbent was only a conservator of the peace, without judicial powers (Toml. L. D., vol. 2, p. 322), or whether they had in view that office as it had existed in this state, under our old constitution and laws, when the incumbent was vested with judicial powers, civil and criminal, of much importance in our frame of government, we need not stop to inquire, for the reason that the jurisdiction and duties of that officer had been, previous to 1857, so far established and defined by law under the new constitution, as to dispense with the necessity of such an inquiry, and to show clearly that he was, at the passage of the act under which *Wallace* was elected mayor, intrusted with judicial powers of great magnitude. He had "jurisdiction to try and determine suits founded on contract or tort, when the debt or damages claimed, or the value of the property sought to be recovered, does not exceed 100 dollars." 2 R. S. p. 451. He could not try the title to land, nor actions for slander, &c. *Id.* p. 452. He had power to administer oaths, issue subpoenas, and attachments for contempt (*id.* p. 453); and to fine for contempt (*id.* p. 459); to issue a venire, impanel a jury, receive the verdict, grant a new trial, or enter judgment thereon (*id.* p. 460); to issue writs of replevin (*id.* p. 464), attachment for property, and *ne exeat* (*id.* p. 473), *capias ad respondendum*, *capias ad satisfaciendum* (*id.* pp. 469, 470). He had to keep a record of his proceedings. *Id.* p. 453. In state prosecutions, his jurisdiction was coëxtensive with the county. *Id.* p. 497. He had exclusive jurisdiction where the fine assessed could not exceed three dollars; and concurrent, &c., to try and determine all cases punishable by fine only, or by fine with discretion to imprison; and jurisdiction to make examinations in all other cases (*id.* p. 497), to hear applications for surety of the peace (*id.* p. 500), &c.

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By turning to 2 R. S. p. 504, it will be seen that four



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offenses are pointed out, over which justices had exclusive jurisdiction; and by an act defining misdemeanors, &c. (*id.* pp. 424, 447), there are more than fifty offenses in which a justice had concurrent jurisdiction, &c., and power to hear, try, determine, and assess a fine, which, if not paid or replevied, gave him the further authority to commit to jail, &c. *Id.* p. 500. The power is given to the mayor, as a part of the punishment, to inflict imprisonment in the county jail, not exceeding thirty days, in such cases, we suppose, as the sentence might be applicable. See § 18. All this power and jurisdiction, which was conferred upon a justice of the peace, certainly made his office one of the inferior Courts which the General Assembly might establish, spoken of in § 1, art. 7, of the constitution, if he was not a judicial officer by virtue of § 14 of that article—a point which we need not determine. It is said that “the test of a Court of record is, whether it has or has not the power to fine and imprison.” 3 Bouv. Inst. 68. As the same jurisdiction, and, in some respects, greater, was conferred upon, and exercised by, the mayor, *Wallace*, we can come to no other conclusion but that, if such judicial power was legally conferred, he was a judicial officer within the meaning of the constitutional provision quoted. This raises the next inquiry—

Were the duties enjoined upon a mayor, by the statute, of such a character as to fall within the prohibition of § 1, art. 3, of the constitution, heretofore quoted?

*Wallace* was, it is alleged, elected mayor. His duties, as a city judge, have been already fully referred to. It is further provided by the same statute (Laws of 1857, p. 46, § 18), that “It shall be the duty of the mayor to see that the laws of the state, and the by-laws and ordinances of the common council, be faithfully executed within such city; he shall be a conservator of the peace, and as such, shall have, within the city limits, the power conferred upon justices of the peace for that purpose; to exercise supervision over subordinate officers, and to recommend to the common council such measures as he deems for the public good; he shall sign all commissions, licenses, and permits



granted by the common council, and he shall perform such other duties as the nature of his office, and the interests of the city, require; he shall have the custody of the corporate seal, and may take and certify," &c. "The mayor and councilmen of the said city shall constitute the common council. \* \* \* The mayor shall be the presiding officer of the common council, and shall have a casting vote in all cases, when a tie, but not otherwise." *Id.* § 28. And "All by-laws and ordinances shall, within a reasonable time after their passage, be recorded in a book kept for that purpose, and signed by the presiding officer of the city." *Id.* § 76.

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It will be observed that, in addition to the duties thus specially devolved upon the mayor, he is "to perform such other duties as the nature of his office and the interests of the city require." This makes it proper that we should inquire into, and briefly refer to, the history of the office, and the nature of the duties of the officer, as formerly understood. "MAYOR (*Præfectus urbis*), anciently *meyr*, comes from the *British miret*, i. e., *custodire*; or from the old *English* word *maier*, viz., *potestas*, and not from the *Latin Major*. The chief governor or magistrate of a city or town corporation. King Rich. I., anno 1189, changed the bailiff of *London* into a mayor; and from that example king *John* made the bailiff of *King's Lynn* a mayor anno 1204. \* \* \* Mayors of corporations are justices of the peace *pro tempore*. \* \* \* The powers and duties of a mayor, or other head officer of a corporation, depend, in general, on the provisions of the charters, or prescriptive usage of the corporation, or the express provisions of an act of parliament. It is commonly one of his duties, as well as of his particular privileges, to preside at the corporate assemblies." 4 Jacobs' L. Dict. 264, 265.—2 Toml. L. Dict. 540. "The chief or executive magistrate of a city. It is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers. But the power and authority which mayors possess, being given to them by local regulations, vary in different places." 2 Bouv. L. Dict. 150. "The chief magistrate of a city or

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corporation." Bailey's Dict. "Originally an overseer, a bailiff. The chief magistrate of a city. In *America*, is the chief judge of the city Court," &c. Webst. Dict.

Except the judicial powers devolved upon the mayor by this statute, his duties, by virtue of his office of mayor, would, in our opinion, be of an executive and administrative character, but whether such as fall within that department of the government as established by articles 3, 5, and 6, of the constitution, is the next inquiry.

As it is expressly provided by the third article that "No person, charged with official duties under one of these departments, shall exercise any of the functions of another," &c.; and as it is averred that *Wallace* was elected mayor, not city judge by that name, it is necessary for us to determine whether his executive and administrative duties are to be classed in one of the great departments of the state government, for the reason that we have already signified, that certain of the "official duties" with which he was charged, fall within the judicial department.

If all the official duties, with which he was charged, are to be classed within the one or the other of those departments, then it is too clear, it appears to us, to require argument, that he had the right to exercise official duties in but one of the departments; and any attempt to require him to discharge duties, at the same time, in another of the departments of the government, would be inoperative.

In other words, if he was, as averred, elected to the office of mayor, the legal and appropriate duties of which are within one of these great departments, and of an executive and administrative character, and he should be required by statute, whilst acting in that capacity in the discharge of those duties, to exercise functions of a character falling within the judicial department, such statute would be simply invalid—one that he might, and should, disregard—just as an officer in the judicial department of the state might disregard any attempt to charge him with official duties of the legislative department. But if the executive and administrative duties with which he was officially charged, should not be considered as within either of the depart-



ments of the state government, because he was merely, in that respect, an officer of a municipal corporation, in that case he might appropriately discharge all those duties at the same time.

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After much consideration, we are of opinion that the executive and administrative duties of *Wallace* were not such as come within those departments of the state government, as established by the constitution, and that he was, consequently, left free to be charged with official duties under either of the other departments; that he was so charged with, and took upon himself, the duties of a judicial character before referred to, not as incidental to his office of mayor, but as separate and independent duties; and that during the term for which he undertook thus to discharge judicial functions, he was ineligible to the office of sheriff.

The first part of this conclusion is in consonance with the decision of the superior Court of the state of *Delaware*, in the case of *The State v. The Wilmington City Council*, 3 Harr. 294. By the constitution of *Delaware*, "No ordained clergyman, or ordained preacher of the Gospel of any denomination, shall be capable of holding any civil office in this state," &c. One *Hagany*, an ordained minister, was elected city treasurer of *Wilmington*; and, upon the matter being properly brought before the Court, it was held, in substance, that the office of treasurer of the city was not a civil office in the state, within the meaning of the constitution; that the word "state," as there used, meant the body politic; that the purpose of the constitution was to establish the principles of government for the community as a body politic—to establish a state government and to provide the mode of its administration; that in speaking of offices, such offices were undoubtedly meant as were designed for that purpose, either directly or indirectly; that a corporation office formed no part of the system of government; that the provision had reference to the political system then framed, to-wit, to state offices, and not to corporation offices.

The case at bar differs from the one above cited in this,



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that here, duties were devolved upon the municipal officer, other than those having reference to the administration of the affairs of the corporation, not incidentally, but in such terms as created, for the time being, a separate, inferior Court—an incorporeal, political being, created for the purpose of administering justice judicially. 3 Bouv. Inst. 67. He was required to judicially administer the laws of the state in respect to misdemeanors, as well as the laws or ordinances of the city government. If his administration of the laws had been confined to those of a municipal character, although his acts might have partaken of the nature of judicial decisions, yet such acts would not, in our opinion, have classed him with judicial officers under the constitution; the classification under that instrument properly including all such, and only such, officers as are clothed with general, not incidental, powers to judicially administer the laws of the state. That he acted in a two-fold capacity is evident, not only from the duties devolved upon him, but from the fact that the evidence of his acts as a judicial officer were to be perpetuated by being made a matter of record, by himself, in proper books kept by him for that purpose (Acts 1857, p. 47, § 19), whilst his acts as a mere executive, corporation officer were kept in remembrance by being spread upon the corporation records, kept by an officer—a clerk provided for that purpose. *Id.*, p. 48, § 20. If a city judge should hereafter be elected, the first-named books would go into the hands of that officer, as his regular successor in judicial station, whilst the corporation books would remain under the control of future officers of the corporation—mayors, councilmen, and clerks.

Under this view, the whole controversy is reduced to a single proposition, namely: The statute conferring upon the chief officer of a city the authority to judicially administer justice, under the laws of the state, is, or is not, constitutional. If it is constitutional, then *Wallace*, having voluntarily accepted position under that law, was, by that act, and by force of the constitutional prohibition, placed in a condition that his mind was left free to discharge judicial functions, for the term for which he accepted, without



being disturbed by seeking preferment, for the time being, in either of the other departments. If the statute, conferring judicial power, is unconstitutional, then a very grave question would arise, as to whether all his acts were not, in that respect, void.

It is clearly the duty of each of the great departments of the government to regard the action of the co-ordinate departments as being authorized by the constitution, unless there is a manifest infraction of that instrument. Measuring this statute by that rule, there was not so decided an excess of authority, by the legislative department, in the adoption of that statute, as would constrain us to pronounce it void. It is our duty to regard the whole statute as operative, if we can properly do so. This we are enabled to do by following the principles of construction laid down in the *Delaware* case above referred to, and, also, in the cases of *The State v. Hutt*, 2 Pike, 282; 3 Greenl. (Maine R.) 284; *Bamford v. Melvin*, 7 id. 14.

There was a motion made in this Court to dismiss the appeal. An act approved *March 2*, 1859, and declared to be in force from and after its passage, authorized the appeal. Acts 1859, p. 35. This case was decided in the Circuit Court, after the taking effect of that act.

We have been greatly aided in the investigation of the questions involved, by the able and ingenious arguments, both written and oral, of counsel on each side.

PERKINS, J.—The opinion of the Court, prepared by Judge HANNA in this case, is sufficient and satisfactory. I do not propose to write another; but simply to briefly notice the decisions of this Court bearing upon one or two of the questions in the pending cause. Its importance and its novelty, in this state at least, justifies me in so doing.

One of the questions in the cause, involves the relation of a city, in this state, to the state. Are the laws, enacted by the city, the laws of the state, and do the officers of the city, in administering her laws, act as officers of the state government? It seems to have been so supposed, so far

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as there appears to have been any idea upon the point, in the case of *The City of Madison v. Hatcher*, 8 Blackf. 341; which case was silently followed in *The City of Indianapolis v. Blythe*, 2 Ind. R. 75.

Hence, in those cases, it was held that where the same act was an offense against the criminal laws of the state, and also against the by-laws of the city, the act could only be punished under the state laws, in the mode prescribed by the constitution; and that punishment, again by the city would put the party twice in jeopardy for the same offense. But the cases of *Bogart v. The City of New Albany*, 1 Ind. R. 38; *The Town of Indianapolis v. Fairchild*, *id.* 315, and *Levy v. The State*, 6 *id.* 281, took a somewhat different view of the question; and, finally, the cases of *Madison* and *Hatcher*, and *Indianapolis* and *Blythe*, *supra*, were wholly overruled by *Ambrose v. The State*, 6 Ind. R. 351.

In *The State v. Moore*, 6 Ind. R. 436, the Court held that where the state of *Indiana*, by her laws, made criminal an act which was also made criminal by the laws of the *United States*, the doing of the act within this state constituted an offense against both the *United States* and the state, two separate governments; that the single act thus constituted two offenses, one against each government, and that each government, by its own officers, might punish the act once, whereby the same act would be twice punished as two offenses, one against each government. And in *Ambrose v. The State*, *supra*, the same doctrine was applied to the government and officers of the state and the city; and it was held that each might punish, in its own mode, by its own officers, the same act, as an offense against each.

This settles the question that the mayor of the city, when acting as such, is not a state officer; and shows that, in acting, both as a mayor for the city, and a judge under the laws of the state, he acts in two capacities, and that the same act might, on the same day, be punished by him, once as mayor, acting for the city, and once as a judge, punishing for a violation of the laws of the state;



and that one of these prosecutions would be no bar to the other.

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It further shows that, though he would act in two capacities, or in two offices, but one of them would be an office under the state. It is as if the state should confer upon the district judge of the *United States* for *Indiana*, jurisdiction of causes arising under the laws of the state. Supposing this could be constitutionally done, and to be done, that judge would, undoubtedly, be a judicial officer of the state and of the *United States*. So the mayor is made, by the law, a judicial officer of the state and of the city; and if this can be done legally, then *Wallace* was, while mayor, a judicial officer of the state, and ineligible to the office of sheriff.

The constitution provides that the judicial power of the state shall be vested in such Courts as the legislature shall create, of which the Supreme and Circuit Courts shall be two; and it further provides that justices of the peace shall be elected, but not that they shall exercise judicial power.

It will be observed that the judicial power is vested in Courts, not in officers. An officer may not necessarily be a Court. A justice of the peace is not necessarily a Court. He is not a Court when elected, simply by virtue of his election, and is not vested, by his election simply, with judicial power. But if the legislature, after or before his election, vest judicial power in that officer, as such, the exercise of which is made the chief and permanent duty of his office, he thus becomes a Court.

A Court is a tribunal charged, as a substantive duty, with the exercise of judicial power; and a judicial officer is the person appointed to exercise that power. These definitions may not be, and it is admitted are, probably, not complete. But they are sufficiently so, for the purposes of this case. A judge will be none the less a judicial officer because some duties he may have to perform are administrative in their character; nor will an administrative become a judicial officer, simply because some acts which he may be required to perform may be, to some extent, judicial in their character.



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The duties of *Wallace*, as a state officer, were substantively, indeed, were entirely judicial, were continuous for his official term, were discharged in the form and with the effect of judicial proceedings in the other Courts of the state.

A word as to the mode in which the city Court is created. The constitution, as we have seen, gives the legislature unrestricted power in the creation of Courts, and points out no mode of filling them with officers, except as to three, viz., the Supreme and Circuit Courts, and justices of the peace. Others, the legislature may create in such mode, and vest with such portion of the judicial power as, within the provisions of the constitution, is deemed advisable. The judges of these Courts may be created by election or otherwise. And the judges in such Courts will be judicial officers, under the disabilities of the constitution.

In this case, *Wallace* was a judicial officer under the state, was elected in a manner which, under the unrestricted power of creating Courts conferred by the constitution, the legislature might adopt, and he was ineligible to the office of sheriff.

The powers which are exercised by a city government are, it thus appears, superadded to those exercised by the state in the same locality. The people of towns and cities are governed that much more than are the people of the state generally. This is deemed a necessary incident to a dense population. The powers thus exercised by the city governments are specified in their charters, and none can be exercised beyond the specifications; and to guard against their stepping beyond, an appeal lies to the state Courts, as from the state to the *United States*. Sometimes the state, by charter, abdicates all power over a particular subject within the city limits, in favor of the city government. *Wood v. Mears*, at this term (1). And see *The State v. Graeter*, 6 Blackf. 105; *The City of Lafayette v. Cox*, 5 Ind. R. 38; *The City of Aurora v. West*, 9 id. 74; *The City of Lafayette v. Jenners*, 10 id. 70.



*Per Curiam.*—The judgment of the Circuit Court is reversed—that judgment being that the proceedings should be dismissed—and that Court is directed to overrule the motion to dismiss, and to hear and determine the case in accordance with this opinion.

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*N. B. Taylor, J. Morrison, J. E. McDonald, and A. L. Roache*, for the appellant (2).

*H. W. Ellsworth, S. Colley, D. McDonald, and A. G. Porter*, for the appellee (3).

(1) *Aste*, 515.

(2) Mr. Taylor submitted the following argument in behalf of the appellant:

The appellee was elected city judge, under the title of mayor. I shall, therefore, in this argument, use the term mayor in the sense of city judge; and I shall maintain the following propositions:

1. The office of mayor, to which the appellee was elected on the first Tuesday in May, 1857, for the term of two years, is a judicial office within § 16, art. 7, of the constitution of 1851.

2. The office of sheriff is not a judicial office, but is merely an administrative office.

3. The office of sheriff is an office of trust or profit under the state.

4. The resignation of the appellee could not render him eligible to the office of sheriff before the expiration of the two years for which he had been elected mayor.

If these propositions are correct, the error of the Circuit Court, in sustaining the motion to dismiss the proceeding, is established beyond all controversy.

*First.* The office of mayor, to which the appellee was elected on the first Tuesday in May, 1857, for the term of two years, is a judicial office within § 16, art. 7, of the constitution of 1851. The original power of judicature is in the whole people of the state. Const., art. 1, § 1.—1 R. S. p. 42. But the people of this state have vested the judicial power of the state “in a Supreme Court, in Circuit Courts, and in such inferior Courts as the General Assembly may establish.” Const., art. 7, § 1.—1 R. S. p. 59.

This language is general and prospective, it embraces, besides the Courts named, all inferior Courts which may be, at any time in the future, established by the General Assembly, whatever the name or the extent of the jurisdiction, because it is not the extent of jurisdiction, but the nature of the power conferred that determines the question, and they are established by the General Assembly, under the power granted in the constitution, without which grant they could not be established.

The language of § 1, art. 7, of our constitution, is different from that of the first section of the fifth article of the constitution of *Illinois*. The decision in the case of *The People v. Willson*, 15 Ill. R. 338, is not, therefore, directly in point; still it has an important bearing on the question. The first section of the fifth article of the constitution of *Illinois* is as follows: “The judicial



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power of this state shall be and is hereby vested in one Supreme Court, in Circuit Courts, in county Courts, and in justices of the peace: *Provided*, that inferior local Courts, of civil and criminal jurisdiction, may be established by the General Assembly in the cities of this state." In the same article it is provided that a judge of the Supreme Court shall be elected by the qualified electors of each grand division of the state, a circuit judge in each circuit, and a county judge in each county. The 11th section of the same article provides that no person shall be eligible to the office of judge of any Court in that state who is not a citizen of the *United States*, and who shall not have resided in that state five years next preceding his election in the division, circuit, or county in which he shall be elected. In the case of *The People v. Willson*, *supra*, the construction of this section came up for the decision of the Court. The question was, whether the defendant, who had been elected recorder of the city of *Chicago*, and who had not been a resident of the state of *Illinois* five years next preceding his election, came within the inhibition of the 11th section. The Court say: "The word 'division' is only applicable to the judges of the Supreme Court; 'circuit' is only applicable to the circuit judges; and 'county' is only applicable to county judges; and each provision has reference to the fact that these judges are respectively elected by the qualified voters in these specified localities. \* \* \* If the constitution had simply provided that no person should be a judge of any Court in this state, unless he is a citizen of the *United States*, and had resided in this state five years next preceding his election, there would have been less room for construction, and more doubt of the eligibility of this respondent. In such a case, the only inquiry would be, is he eligible to the office of a judge of a Court in this state?"

This suffices to show that the question before the Court, and determined in that case, differed from the one involved in this case. There the question arose as to the application of the terms "division," "circuit," and "county;" here, the point to be determined is, what is a judicial office? In that case, it is decided that a justice of the peace is a judicial officer, and a recorder also.

In 7 Bac. (Bouv. ed.) 317, it is said that it seems the better opinion that a recorder of a town cannot make a deputy without a special grant or custom for that purpose, that office being a judicial one, relating to the administration of justice.

In the case of *The People v. Kane*, 23 Wend. 414, the office of police justice is held to be a judicial office. It is not the name, however, but the duties, as we shall see, that decides the character of the office.

In the case of *The People v. Willson*, *supra*, the Court say: "If the constitution had simply provided that no person should be a judge of any Court in this state, &c., the only inquiry would be, is he elected to the office of a judge of a Court in this state?" The only inquiry in this case, then, is, is the office of mayor, to which the appellee was elected on the first *Tuesday in May*, 1857, a judicial office?

The 16th section of the 7th article of the constitution of this state, declares that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office." 1 R. S. p. 61.

This is a plain provision, and free from ambiguity. What shall be the rule of interpretation and construction? Shall it be strict or liberal? Shall we be



governed by the plain, obvious meaning of the words used, and by the evident intention of the framers of the constitution, or not?

Judge STORY says: "In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded in the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." 1 Story on Const., p. 322, § 451.

In the case of *Gibbons v. Ogden*, 9 Wheat. 188, MARSHALL, C. J., says: "What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent, then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

In regard to the interpretation of constitutions, the same rules apply which govern in the interpretation of statutes. If a statute or constitutional provision is of doubtful import, it may be susceptible of two interpretations; one more restricted or severe, the other more enlarged or equitable. Sedgw. on Stat., p. 491. But if the language of the law clearly expresses its meaning and intention, that intention must be carried out. *Id.* pp. 277, 284. "Where the legislature has used words of a plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it had expressed. The fittest course, in all cases where the intention is brought into question, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the act of parliament. The most enlightened and experienced judges have, for some time, lamented the too frequent departure from the plain and obvious meaning of the words of the act of parliament by which a case is governed, and themselves hold it much the safer course to adhere to the words of the statute, construed in their ordinary import, than to enter into inquiry as to the supposed intention of the parties who framed the act." Smith on Stat., p. 690.

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"The only rule," says Lord C. J. TINDALL, "for the construction of acts of parliament is, that they should be construed according to the intent of the parliament which passed the act." The rule is, as we shall constantly see, cardinal and universal, that if the statute is plain and unambiguous, there is no room for construction and interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed. It may be proper, it has been said in *Kentucky*, in giving a construction to a statute, to look to the effects and consequences when its provisions are ambiguous, or the legislative intention is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial action." "So, too," it is said by the Supreme Court of the *United States*, "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Sedgw. on Stat., p. 231, and authorities cited.

The language, "no person elected to any judicial office," is plain and unambiguous. It is general and unlimited. It would scarcely have been possible to have made use of plainer and more comprehensive language, entirely free from all qualifying or restrictive words. No interpretation is required,—there is room for none, except the single term, "judicial office." The interpretation of that settled, there is no difficulty whatever; for the declaration is aimed not at some judicial office or offices, but against any person elected to any such office. And this is a substantive and independent provision. Smith on Stat., p. 711, § 576.

"Any," is altogether universal and indefinite; it applies to every judicial office, without distinction, from the highest to the lowest. Crabbe's Synon., p. 250.

The Court will not, therefore, make an interpretation contrary to the express letter of the provision; for nothing can so well explain its meaning as the precise words used by its framers. Smith on Stat., p. 651, § 506.—Leib. Leg. and Pol. Herm., p. 171, § 15.

The intention of § 16, art. 7, of the constitution, is manifest from its own reading, without resort to extrinsic circumstances. The motives or reasons which operated in the mind of the convention, and impelled it to the enactment of this section, are obvious.

A person who solicits and takes upon himself such an office, ought to hold it during the term for which he was elected. The incentive, so common, to attain one office in order to make it a stepping-stone to another, and, perhaps, more desirable and lucrative office, which oftentimes leads to abuses of the trust, is dangerous and ought to be checked. Experience and integrity in the discharge of judicial functions ought to be secured, and persons elected to such an office prevented, as far as possible, from converting it into a vehicle for electioneering purposes. But be this as it may, the intention to render any person elected to any judicial office ineligible, during the term for which he shall have been elected, to any office of trust or profit under the state, other than a judicial office, is expressed in a manner devoid of contradiction and ambiguity. There is, therefore, no room for interpretation and construction. Sedgw. on Stat., p. 295.—*Id.* pp. 260, 277.—Smith on Stat., p. 651, § 506. The people have spoken; their intention is free from doubt; and their will



must be obeyed. Sedgw. on Stat., p. 231. And there is no possible motive or reason which could have operated in the mind of the convention as a cause for the enactment of such a provision, which would not apply with as much, if not more, force to the lowest judicial office created by the General Assembly under the power given in the first section of the 7th article of the constitution, as to the highest named in the constitution; for the language of § 1, and the general and unlimited power given to the General Assembly to establish inferior Courts, utterly forbids such a narrow view. Such a construction would lead to the greatest of all possible absurdities. And every interpretation or construction which leads to an absurdity ought to be rejected. *Id.* p. 270.—Smith on Stat., pp. 631, 633, §§ 486, 488. Such a construction would give us two classes of judicial offices—one within, the other without, the 16th section of the 7th article of the constitution. This would surely be absurd and defeat the very language, object, and intent of the framers of the constitution. If, then, one construction or interpretation would lead to absurdity, the other not, we must adopt the latter; for that construction or interpretation which leads to the more complete effect which the convention had in view, is preferable. Smith on Stat., p. 633, § 488. The 16th section of the 7th article may also be viewed as a remedial provision. It is an innovation on the constitution of 1816. It was a question with the convention whether the prohibition should not be made to apply to all offices. The first proposition was as follows: "The state shall be divided into a suitable number of circuits, and a circuit judge shall be elected by the electors in each circuit, and shall reside therein; and shall hold his office six years, if he shall so long behave well; and no person elected to any office in this state shall be eligible to any other office of trust or profit in the state, during the term for which he was elected." Deb. Const. Con., vol. 2, p. 1785.

The object proposed by the advocates of this measure was to discourage office-seeking as a business, to compel a person who accepted an office to hold it until the time for which he had been chosen expired; or, if he did not, to remain a private citizen until the expiration of the time for which he had been chosen, because of the evils experience had shown to arise from frequent changes, and the abuse of power, and the prostitution of official honor and integrity on the part of those who sought and accepted a particular office merely as a means of getting another and better, by means the most certain and speedy. But the provision was ultimately confined to persons elected to judicial offices, without limitation, as being those in which the people at large were more deeply interested, and which, therefore, required the strongest checks and guards. If viewed, therefore, as a remedial provision, it should be construed largely and beneficially, so as to suppress the mischief and advance the remedy. Sedgw. on Stat., pp. 41, 359.—1 Story on Const., p. 304, § 429. We are not, however, at liberty to go beyond the just and ordinary sense of its terms. But there is no necessity for so doing. They are broad and comprehensive enough without, as has already been shown. They are general and unlimited, universal and indefinite, as applied to the subject-matter—"any judicial office." They comprehend and embrace the whole class.

What, then, is a judicial office?

In 7 Bacon's Abridgement (Bouv. ed.), p. 280, "Judicial offices are" defined to be "those which are exercised in the administration of the law." By this

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we understand that they are offices exercised in deciding, determining, speaking, or pronouncing the law. Taking this as a correct definition, a judicial office is an office which is exercised in the administration of the law. Therefore, no person elected to any office exercised in the administration of the law, shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than an office exercised in the administration of the law. "No person elected to any judicial office."—This evidently means any judicial office in the state, not abstractly considered, but any such office in any locality in the state, be it city, county, district, or circuit; that is, any judicial office not without the bounds of the state—any judicial office at all concerned in the administration of the laws of the state. "Under the state," applies to the office of trust or profit from which the person elected to any judicial office is excluded during the term for which he shall have been elected. Now, that the office of mayor or city judge was, and is, an office in the state—one created, and its powers and duties prescribed, by the General Assembly, cannot be denied. That the mayor's or city judge's Court is also established by the General Assembly, and its powers and duties defined by the General Assembly; and that the General Assembly has conferred judicial power on the mayor, made him a judge, not merely a police judge, but clothed him with civil and criminal jurisdiction beyond simple violations of municipal ordinances, is equally true. Acts of 1857, p. 46, §§ 18, 19.

The mayor's or city judge's Court is, therefore, an inferior Court established by the General Assembly in the state; and it is a Court of record, for he is required to keep a record of his proceedings. 7 Blackf. 272. It is true, that, primarily, a mayor is the executive officer, only, of a city; and this, Judge PERKINS has correctly stated in *Powell's* case, *Daily Sentinel*, August 28, 1858. He says: "The mayor of a city is not necessarily, scarcely indeed, properly, a judicial officer. His appropriate duties are executive, analogous to those discharged by the governor of the state." But his Honor, after thus stating what a mayor is, considered only as mayor, says: "He may be empowered to act in a judicial character also. He may be constituted a Court. He is so by the city charter. He is made judge of a city Court, with the general powers, and governed by the rules of practice, of a justice of the peace; and when he acts judicially, he acts under those general rules."

It is true, a municipal corporation is a kind of *imperium in imperio*, a government within a government; so is a township, county, &c. It is created and empowered to act by the supreme legislative power of the state. It is not, however, independent of, but subservient to, the creator or sovereign. It is part and parcel of the machinery of the state, to carry out its objects and subserve its purposes—to preserve order and protect property. It would, then, be strange indeed if the General Assembly could not establish a Court therein, provide for such Court a judge, clothe him with judicial power and authority; and when thus established or constituted, he is a Court; he is made judge of a Court. Judicial power and authority is the very essence of a judicial office. The one cannot exist without the other. The power and authority are inseparable from the office; the office possesses or confers the power and authority. But further, a Court is a place where justice is judicially administered. 3 Blacks. Comm., p. 23. It is a kind of incorporeal being, which can be seen only in the person of the judge, and felt in the exercise of his func-



tions. In common parlance, the judge alone is the Court. 2 Bac. (Bouv. ed.), p. 616. There cannot be a Court without a judge. 3 Blacks. Comm., p. 25. "Judge" and "justice" are convertible terms; and all officers elected to administer the law, call them by what name you please, are "judges" or "justices." 2 Toml. L. Dict. 281, tit. Judge.—*Id.* 317, tit. Justices.

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As already stated, a judicial office is an office exercised in the administration of the law, or in the discharge of judicial functions—one in which some part of the judicial power of the state is vested; for it cannot be said that all the judicial power of the state is vested in any one, or in any number less than the whole. Const., art. 7, § 1.—7 Bac. (Bouv. ed.), p. 279.—2 Toml. L. Dict. p. 665.

The judge or justice administers the law, that is, speaks the law, determines questions at issue in a Court of law, or decides upon the rights of others by authority of law. 3 Blacks. Comm., p. 25.—15 Ill. R. 391.—1 Bouv. L. Dict. 724. The judge, justice of the peace, mayor, or whatever other name the law may confer, is, therefore, a judicial officer, his office a judicial office, and the power and authority with which he is clothed, or which he exercises, judicial power. Const., art. 7, § 1.—3 Blacks. Comm., p. 25.—2 Toml. L. Dict. 281.—*Id.* p. 317.

But § 1, art. 7, of the constitution, vests the judicial power of the state in the Courts named, "and in such inferior Courts as may be established by the General Assembly." The office of judge or justice of any such inferior Court so established must, then, be a judicial office within the 16th section of the same article, because such judge or justice of any such inferior Court is empowered by the General Assembly, under the constitution, to administer the law—to determine questions at issue, or decide upon the rights of others, within his jurisdiction. The term "any judicial office," then, as used in the 16th section, cannot be restricted to any particular judicial office, but must include not only judges of the Courts named, but also the judges of all such inferior Courts as may at any time be established in the state by the General Assembly; as, for example, judges of Courts of Common Pleas, and mayors or city judges—that is, all offices relating to the administration of justice, or the exercise thereof. This seems an honest, faithful, and *bona fide* construction, having common sense for a guide—one that cannot be avoided, and a conclusion that cannot be escaped, without resorting to sophistry. Now, the General Assembly of the state of *Indiana*, by a general law, entitled "An act to repeal all general laws now in force for the incorporation of cities," &c., approved March 9, 1857, established an inferior Court in every city in this state, called a mayor or city judge's Court. Acts of 1857, p. 46, § 18. The words mayor or city judge are used in the act in reference to the Court as synonymous. *Id.* p. 47, § 19. The act provides that the mayor shall be elected for the term of two years. A city judge is not elected unless the council, deeming it for the best interest of the city, cause one to be elected. *Id.* p. 44, § 9. The election of a city judge, by that name, distinct from the mayor, depends upon the action of the common council. As a separate and distinct officer, he cannot be called into being except by the action of the common council. Not so the mayor or city judge. But if the council deem it expedient for the best interest of the city to cause that separate functionary, called a city judge, to be elected, he must be elected at the general election at



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which the mayor is also elected, and serves for the same length of time, viz., two years. *Id.* p. 44, § 9, and p. 46, last clause of § 18.

If the council does not order the election of a city judge, at the general election at which the mayor is elected, the mayor is elected mayor or city judge of the mayor's or city judge's Court for the term of two years. (See same section and pages last cited.) It is not in the power of the council to order the election of that separate functionary simply styled "city judge," during the continuance in office of the mayor for the term for which he was elected. *Ibid.* In the absence of such order and election, then, the mayor is not elected merely as mayor or the chief executive officer of the city. He is elected mayor or city judge. In the language of PARKINS, J., *supra*, "He is made judge of a city Court, with the general powers, and governed by the rules of practice, of a justice of the peace." The duties of the mayor are set forth in § 18, p. 46, Acts of 1857.

The first specified are those which properly belong to the mayor as the chief executive or governor of the city, except the conservation of the peace, which is common to all judicial officers. Const., art. 7, § 15.—1 R. S. p. 60. These are additions and not subtractions. How, then, can they detract from his judicial office, or his judicial power and authority? It is not easy to perceive. But it may not be amiss to inquire somewhat into this union of power and its effect. In *Watkins v. Holman*, 16 Pet. 60, it is said, "In some cases it is difficult to draw a line that shall show with precision the limitation of power, under our form of government. The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, a judicial power. And so a Court, in the use of a discretion essential to its existence, by the adoption of rules or otherwise, may be said to legislate. A legislature, too, in providing for the payment of a claim, exercises a power in its nature judicial; but this is coupled with the paramount and remedial power." In the case of *Yates v. Lansing*, 5 Johns. 297, KENT, C. J., says: "The allowance of a writ [*habeas corpus*] in vacation, is not a judicial act. It is merely analogous to the case stated in *Green v. The Hundred of B.* (1 Leon. 323), where it was held, that an action on the case lay against a justice of the peace, for refusing to take the oath of the party robbed, because, in such case, he did not act as a judge, but as a particular minister appointed by the statute of *Elizabeth*." Many other examples might be cited, where the law imposes duties upon, or authorizes their performance and they are performed by, persons holding judicial offices, which are not in their nature judicial, and which have never in any degree been supposed to diminish or interfere with the judicial office. But are these executive duties inconsistent with the exercise of his judicial functions?—and does the union of the two in him invalidate the whole, under the third article of our constitution? 1 R. S. p. 48. If the decision in the case of *The State of Delaware v. The Wilmington City Council*, 3 Harr. 294, is correct, they do not. For, according to that decision, the office of treasurer of a public corporation, such as the city of *Wilmington*, was not a civil office in the state of *Delaware*, under that clause in her constitution, which declared a clergyman ineligible to any "civil office in the state." The office of mayor, then, as the chief executive officer of a city only, would not come within the purview of the third article of the constitution; and the executive duties are not inconsistent with the discharge of judicial power, and



leave his judicial office separate and distinct from the other, and clearly within the prohibition contained in § 16, art. 7, of the constitution. For the judicial office must be created by the General Assembly under the power contained in the first section of art. 7, or it cannot exist. No power to establish a Court can, elsewhere, be found. The power to establish the Court carries with it the power to provide the judge. And when the Court is thus established, according to every mode of correct reasoning, the judge of such Court is as much a judicial officer, and his office as much a judicial office, as that of a supreme or circuit judge; because the judicial power of the state is vested in the Supreme Court, in Circuit Courts, and in such inferior Courts as the General Assembly may establish. Const. art. 7, § 1.—1 R. S. p. 59.—2 Ark. R. 282.

If this view be correct, it furnishes the key to the solution of the question, reconciles what is said to be the conflicting powers, and sustains the validity of the mayor's Court beyond all question.

The act further provides that the mayor shall hold a city Court; that he shall have exclusive jurisdiction of all prosecutions for violations of the by-laws and ordinances of the city, within the limits of the city, the jurisdiction and powers of a justice of the peace, in all matters civil and criminal arising under the laws of the state, and for crimes and misdemeanors, his jurisdiction shall be co-extensive with the county in which the city is situate. Acts 1857, p. 46, § 18. This is sufficient to make the mayor a judicial officer, and his office a judicial office; and these powers are not incidental, they are principal. They are conferred by the statute, and he exercises them as mayor or judge of the city Court.

The case of *Morrison v. McDonald*, 21 Maine R. 550, does not, therefore, apply. There, a city judge was elected, and a recorder also. The duty of the recorder, by the statute, was to act as clerk of the city Court, but in the absence of the regularly elected city judge, he was authorized to act as judge *pro tempore*. The recorder was not, therefore, elected city judge, but clerk only. He was no more elected judge than would be the prosecutor or any other member of the bar, if by appointment of the circuit judge, he should sit on the circuit bench and hold Court *pro tempore* in the absence of such judge. But admit, for the sake of the argument, that the vesting of executive and judicial power in the appellee, was in contravention of the third article of the constitution, what is the result? He was elected mayor, and by that title city judge. Could he not act as city judge and decline the duties imposed upon him as mayor only, according to the ruling of the judges in 2 Dallas, 409? But suppose he did not, and discharged both, did this reduce his judicial office to a mere nothing? Surely not. It could have no more effect on his judicial office, than would the compliance of the circuit judge with the provisions of the statute (2 R. S. p. 10, § 8) which requires him to examine the clerk's offices in his circuit, see if the books and papers are properly kept, and make out and file a sworn report with the several county auditors. And no one would, for a moment, maintain so absurd a position as that the performance of that executive or administrative act would make him less than a judge, or render him incapable of holding and exercising his judicial office. Besides, the appellee was elected to the office of city judge, and accepted and discharged the duties of the office until he saw fit to resign. Can this Court inquire into the validity of the office collaterally, or would the appellee be permitted to justify his course on the ground that the law which created, and under which

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he was elected to and exercised his office, was void? By our statute, the mayor is not elected and commissioned as a justice of the peace. He is elected mayor or city judge of a separate and distinct Court. The case of *The State v. Maynard*, 14 Ill. R. 419, does not, therefore, in any respect, affect the question. There, the mayor could exercise no judicial power except as justice of the peace. The Court say: "Except as justice of the peace, it is very clear that the mayor could exercise no judicial power. There can be no well grounded pretense that he was a judge of the Supreme Court, Circuit Court, or county Court, or that he was the judge of an inferior local Court, established by the General Assembly under the proviso to the first section quoted. Under that proviso, no attempt has been made to establish a Court in the city of *Rockford*." Here the mayor exercises judicial power as mayor or judge of the city Court, a separate tribunal; an inferior Court established by the General Assembly by authority of the constitution. He does not exercise judicial power as justice of the peace; therefore, § 22, art. 4, of the constitution, is not violated. Moreover, it is apparent that if the common council should order a city judge to be elected, his office would be a judicial office. This being true, how can it be different when the mayor is elected. If, in the one case, it is a judicial office, it surely must be so in the other. And that there cannot be a judicial office created by the General Assembly unless by the power contained in the first section of article 7, of the constitution, and without its being a judicial office within the 16th section of the same article, has been conclusively shown. The office of mayor, to which the appellee was elected on the first *Tuesday* in *May*, 1857, for the term of two years, is, then, a judicial office within the 16th section of art. 7, of the constitution, which declares that "no person elected to any judicial office, shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office." 1 R. S. p. 61. This conclusion seems to be fair, legitimate, and unavoidable.

But it has been insisted by the appellee, and may be again, that justices of the peace are not judicial officers within the 16th section of art. 7; therefore, mayors are not. Is it true that justices of the peace are not within that section? The constitution provides for the election of a competent number of justices of the peace, and declares that "their powers and duties shall be prescribed by law." 1 R. S. p. 60, § 14.

Now it is unnecessary to refer to the fact that from the 34th Edw. III., to the present time, justices of the peace have been judges of record, and their Courts Courts of record (3 Bac. Abr. 396.—7 Blackf. 273), or to insist upon the, at least *prima facie*, case made by that fact connected with their being named in the articles on the judiciary, and to the additional one, that in § 22, art. 4, of the constitution (1 R. S. p. 52), it is declared that no local or special law shall be passed regulating the jurisdiction and practice of justices of the peace; it is sufficient that the constitution declares that their powers and duties shall be prescribed by law, and that they have been so prescribed. The law has made them Courts, made them judges of Courts, given them judicial power, and imposed upon them judicial duties. 2 R. S. pp. 449, 505. The General Assembly, in whom the power is vested, has made them inferior Courts, and by virtue of the power in § 1, art. 7, of the constitution, vested in them a part of the judicial power of the state. The office of justice of the peace is, then, clearly



a judicial office, within the 16th section of art. 7, as much so as that of a supreme or circuit judge. 2 Ark. R. 282.

*Second.* The office of sheriff is not a judicial office, but is merely an administrative office.

At common law, it is said, the office of sheriff was of a mixed nature—ministerial and judicial. 3 Salk. 322.—3 Toml. L. Dict. 480.—8 Bac. Abr., Bouv. ed., tit. Sheriff, let. D., p. 688. But this is hardly correct, for in the Courts Baron and Courts Leet, every suitor of the manor gave his voice as a juror. 3 Blacks. Comm. 33, 34.—4 *id.* 278.—2 Johns. 71. And Lord ESKINS, in his celebrated argument on the rights of juries, says: "On appeals from these domestic jurisdictions to the county Court, and to the town (circuit) of the sheriff, or in suits and prosecutions originally commenced in either of them, the sheriff's authority extended no further than to summon the jurors, to compel their attendance, ministerially to regulate their proceedings, and to enforce their decisions. And even where he was specially empowered by the king's writ of *justices*, to proceed in causes of superior value, no judicial authority was thereby conferred upon himself, but only a more enlarged jurisdiction on the jurors." Goodr. Brit. El., p. 658. In this he is supported by *Blackstone*. 3 Blacks. Comm., p. 36. *Blackstone* says: "The county Court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justices*; which is a writ empowering the sheriff for the sake of dispatch, to do the same justice in his county Court, as might otherwise be had at *Westminster*. The freeholders of the county are the real judges in this Court, and the sheriff is the ministerial officer." Be this as it may, however, under our constitution and laws the office of sheriff is only an administrative or ministerial office. Const., art. 3, § 1.—*Id.*, art. 6, § 2.—1 R. S. pp. 48, 58.—2 Ark. R. 282.

But it has been urged by the appellee, that the sheriff acts judicially in writs of *ad quod damnum*. This is not the case. In such proceeding he acts merely as the servant of the Court, under a writ issued by order of the Court, summons the jury by command of the writ, ministerially regulates their proceedings, and returns the inquest into Court. 2 R. S. pp. 189, 191, §§ 687, 696.

It is taking the definition too large, to say that every act where the judgment is at all exercised, is a judicial act. 3 Burr. 1262.

In *Tillotson v. Cheekam*, 2 Johns. R. 63, it is decided that the execution of a writ of inquiry is an inquest of office, and the officer who presides acts ministerially and not judicially. At p. 71, KENT, C. J., says: "The inquisition is merely an inquest of office, and the act of presiding is ministerial and not judicial, notwithstanding there are some loose sayings to be gleaned from the books, that seem to countenance a contrary opinion. The sheriff gives no judicial decision upon the law, and concluding to a judgment, any more than what might be requisite in the performance of any ministerial act. The reason given why the jurors cannot be challenged on a writ of inquiry of damages is, because it is only an inquest of office, and the sheriff does not act as judge." 1 Roll. Abr., tit. Trial, P.

A judicial office relates to the administration of justice, or the actual exercise thereof; it gives the power to decide—to determine. A ministerial office gives the officer no power to judge of the matter to be done, but requires him to obey the mandates of a superior. 2 Blacks. Comm. 25.—7 Bac. Abr. (Bouv. ed.), p. 280.

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The office of sheriff is not, therefore, a judicial office, but is merely an administrative or ministerial office.

*Third.* The office of sheriff is an office of trust or profit under the state.

That the office of sheriff is an office of trust or profit is too plain to require argument or authority. That it is an office under the state, within § 16, art. 7, of the constitution, is evident from § 2, art. 6, of the constitution. 1 R. S. p. 58.—*Id.* p. 223, § 1.

*Fourth.* The resignation of the appellee could not render him eligible to the office of sheriff before the expiration of the two years for which he had been elected mayor.

In discussing this proposition, the rules relating to interpretation and construction already stated and referred to, apply in their full force. The language of § 16 is positive. "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible," &c. That is, the person elected to such office shall not be eligible during the whole period of time for which he shall have been elected. The word "term" is here used in the sense of time, as is clear from what follows—"for which he shall have been elected"—that is, chosen or appointed.

The prohibition relates and attaches to the person elected to any judicial office, and it extends or continues during or until the expiration of the time for which he was elected. It is the time for which he was elected, and not the time that he may continue to hold and exercise the judicial office, that is spoken of; and it is declared that the ineligibility shall continue as long as the time lasts for which he was elected. The office, or the power and right to exercise the office, may be determined by resignation or otherwise, before the expiration of the term or time for which he was elected; but does that annihilate the residue of the time for which he was elected? Not at all. It still exists, and only expires with the time—two, four, or six years—for which he shall have been elected. *Biddle v. Willard*, 10 Ind. R. 62.

Now the term for which the appellee was elected mayor, did not expire until the first *Tuesday* in *May*, 1859, and until his successor was elected and qualified.

He was not, then, eligible to the office of sheriff when he was elected at the general election for the state, on the second *Tuesday* in *October*, 1858.

(3) Counsel for the appellee submitted the following argument:

The first question presented is—

Was *Wallace*, when mayor, a judicial officer as contemplated by the constitution?

The constitutional provisions relied upon by the appellant's counsel are as follows: "No person elected to any judicial office, shall, during the term for which he shall have been elected, be eligible to any office of trust or profit, under the state, other than a judicial office." Const., art. 7, § 16. And again: "The judicial power of the state shall be vested in a Supreme Court, in Circuit Courts, and in such inferior Courts as the General Assembly may establish." Const., art. 7, § 1.

It is from the clause last cited, taken in connection with certain portions of the "act for the incorporation of cities," providing, in the contingency of a failure to elect a city judge, for the discharge of his duties by the mayor, and defining such duties as analogous with those assigned to justices, that the con-



testant seeks to establish the mayoralty as a "judicial office," and its head as a "judicial officer," within range of the constitutional prohibition.

Even admitting the position claimed, it is contended by the contestee that the argument deduced from the performance of analogous duties, is destroyed by the futility of attempting to introduce justices of the peace to the circle of such judicial power as seems contemplated by the constitution. If entitled to admission, it must be because they meet the constitutional requirements. But they are surely not judges of a "Supreme" or "Circuit" Court, nor, as we think equally clear, of any "such inferior Court as the General Assembly may establish."

However it may be elsewhere, in this state the office of a justice of the peace, as well as the mode of election to and duration of its term, is, in fact, directly provided by the constitution, leaving to the General Assembly no agency in its creation, and only a right to prescribe the powers and duties of a Court, if such it be, which the constitution has established. The language is (§ 14, art. 7, of the constitution), "A competent number of justices of the peace shall be elected by the voters of each township in the several counties. They shall continue in office four years, and their powers and duties shall be prescribed by law." And it may be remarked in this connection, that the Supreme and Circuit Courts, as to the number of their judges, manner of election, and duration of term, are provided in the same constitution (see §§ 2, 3, 4, 8, 9, of art. 7), in language almost precisely similar with that creating justices of the peace, with powers of the same kind vested in the General Assembly to prescribe the nature and extent of jurisdiction. They are all, therefore, equally established by the constitution.

It results, therefore, that the constitution has established the distinct offices of supreme judge, circuit judge, and justices of the peace, and yet, in defining the "judicial power" of the state, has expressly admitted to it only the former, to the necessary and direct exclusion of the latter.

Nor do these views derogate at all from the true position and efficiency of justices. They can still discharge all the important duties committed to their care; their Courts may continue to be those of record; and they, as heads of the same, to be, not only in common parlance, but in fact, judicial officers, without possessing the peculiar qualifications demanded for admission into the circle of judicial power, as defined and restricted by constitutional provisions.

But to return to our main argument. What are the primary and natural duties of a mayor? We answer—

I. That his duties are not, in general acceptation, of a judicial character; but, on the contrary, are wholly ministerial.

Lexicographers define a mayor as the chief magistrate of a corporation; and a magistrate—from the *Latin*, *magistratus*—as one holding public authority. *Vide* Webster, Johnson, and others. *Magistratus est qui præsit*—one who presides. Cicero de Legibus. As applied to municipalities, this officer was called by the Romans, *Prætor Urbanus*, and sometimes *Major Urbanus*—city ruler or elder; from which our term of mayor seems to be derived, though referred by others to the *Amoric*, *meur* and *Welsh*, *maer*, signifying to keep or guard. Richard I. of England changed the bailiffs of London, A. D. 1189, to mayors, with administrative power only; and the title of mayor, with the same restricted power, had become a common one in the time of Bracton.

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See, in general, Cicero's Roman Law, book 3, chap. 1; Adams's Roman Antiquities; Ainsworth's Dict.; Cam's Britannica, 325; Bracton's Folio, 57.

II. Nor are the primary and essential duties of mayors, in this state, of a judicial character.

It is provided (see act for incorporation of cities, approved March, 1857, §§ 18, 28), that mayors "shall preside at meetings of the city council and recommend measures for its consideration; see that state laws and the corporation ordinances are faithfully executed; exercise supervision over inferior officers; act as conservators of the peace; have the custody of the corporate seal, and take and certify under the same the proof of deeds and other instruments of writing; sign commissions, licenses, and permits, and perform such other duties as the nature of their office and the interests of the city require." All of which duties are executive or ministerial in their nature.

III. Nor are such judicial acts as may be performed within the state by mayors, of the essence of or dependent upon the mayoralty, but wholly incidental and contingent.

The act for the incorporation of cities (see Acts of 1857, p. 44, § 9), contemplates the two distinct offices of mayor and city judge—the latter depending upon the will of the common council; and further, that the exercise of any judicial power by the mayor, shall be contingent upon the non-election and qualification of said judge. No judge having been chosen, the mayor may perform his duties; but with the election and qualification of such judge, all judicial action by the mayor ceases, not to be resumed even during the absence of said judge, who, in such case, must deposit his docket with some justice. Acts of 1857, pp. 46, 47, §§ 18, 19. Nor are these separate offices convertible at the pleasure of their holders, for while the mayor may, in the case provided, act as judge, the latter cannot, in any contingency, discharge the primary and essential duties of the mayor.

IV. The exercise of judicial power by strictly executive officers is no rare occurrence, nor does it constitute the actors "judicial officers," within the meaning of the constitution.

Cases of this kind are numerous. Sheriffs are empowered to try writs of *ad quod damnum*, and for that purpose may impanel and charge a jury and receive its verdict. 2 R. S. p. 188, art. 41. Clerks of the Common Pleas and Circuit Courts may take recognizance of bail (*Id.* p. 133, § 421), which shall have the effect of a confessed judgment. *Id.* p. 133, § 427. Coroners may summon and hold Courts of inquest, recognize witnesses, swear and charge a jury, and perform other judicial acts (*Id.* chap. 7); and the various boards of county commissioners throughout the state, upon which, in the express language of the constitution (see art. 6, § 10), the General Assembly can confer only "powers of a local, administrative character," may yet (1 R. S. p. 272, § 19) assemble as a Court, "summon witnesses, punish contempt, coerce the payment of costs, and try and determine cases of contested elections," in all of which they are to be "governed by the rules of law obtaining in the Circuit Court." Jurors, also, by express constitutional enactments (art. 1, § 19), are made, in criminal cases, judges of both law and facts; and it has been decided that judges of elections exercise judicial functions. *Rail v. Potts*, 8 Humph. 225. Yet it cannot be successfully contended that all or any of the acts enumerated, constitute the actors judicial officers, as contemplated by the constitution.



V. Nor are judicial decisions wanting in support of our position.

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In the *Powell habeas corpus* case, before his Honor, Judge PERKINS, in vacation, and reported in *The Indiana State Sentinel*, under date of August 28, 1859, it is held that "the mayor of a city is not necessarily, scarcely indeed, properly, a judicial officer. His appropriate duties are executive, analogous to those discharged by the governor of the state." Nor should it be forgotten that this opinion was pronounced by the learned judge referred to, at a time when the act of 1857, for the incorporation of cities, from which contestant so strenuously argues the judicial nature of the mayoralty, was in full force, the act having been accepted by the common council of the city of *Indianapolis*, and the decision involving an ordinance adopted under it by that council.

The case of *Morrison v. McDonald*, 21 Maine R. 550, 557, is an important one, establishing the positions that judicial officers must be such to a general intent, and that the office cannot be inferred from a mere exercise of judicial authority.

The following is an abstract of the case:

It is provided by the constitution of the state of *Maine*, art. 9, § 6, that "the tenure of all offices which are not, or shall not be otherwise provided for, shall be during the pleasure of the governor and council." And again, art. 6, § 4, that "All judicial officers, except justices of the peace, shall hold their offices during good behavior, but not beyond the age of seventy years."

*Morrison* had been appointed for four years, and during the pleasure of the governor and council, as recorder of the city Court of *Bangor*, of which *McDonald* was municipal judge.

The term having expired, one *Prescott* was appointed as successor, to whom *Morrison* refused to deliver up the office, disobeying the mandamus of *McDonald*, who thereupon committed him to jail.

The tenure of the office of recorder, as to duration, was not prescribed in the act establishing the office.

It was contended by *Morrison* that the governor had no power to remove him and appoint a successor; that by the city charter he was fully authorized to act in the place of judge, in his absence or death, in all criminal cases, with power to try, judge, and punish; and that he was in fact a judicial officer, whose term extended, under the restrictions mentioned, during good behavior.

The case came up on error in the Eastern District Court. WHITMAN, C. J., gave the following opinion:

"We cannot bring our minds to the conclusion that a recorder is, in the sense contemplated in the constitution, a judicial officer. It seems that the framers of that instrument had in view those who, to a general intent and purpose, were such, and not those who were incidentally and casually intrusted with the exercise of some attribute of a judicial character.

"The instances are numerous in which individuals are expected, in connection with their chief duties, characterizing the duties of their appointment, which in the main is in no wise judicial, to exercise, as incident thereto, casually, some judicial power. Take, for instance, the senate of the state. That body has judicial powers in cases of impeachment, but it never occurred to any one that its members were to be deemed judicial officers. The great body of their power is wholly foreign to anything of a judicial cast, and they never could have been viewed as judicial officers. Auditors and masters in chancery, in connection with their ministerial duties, perform sundry acts of a



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judicial nature; so do the assessors of taxes of our municipal corporations, and commissioners on insolvent estates, and commissioners to adjust controversies for the damage occasioned by flowing lands, under the act concerning mills, and to make partition of real estate; and in this connection, the case of the county commissioners may well be referred to, since it has been deemed proper to authorize an appeal in all cases in which there can be any litigation before them between parties, to this Court, when whatever may be done in the matter of such appeals must be admitted to be of a judicial nature."

The case of *The Commonwealth v. Dallas*, (reported in 4 Dallas, 229, 231, and still more fully in 3 Yerger, 300,) is equally in point.

This case arose under a provision of the constitution of *Pennsylvania*, "that no person holding or exercising any office of trust or profit under the *United States*, shall, at the same time, hold or exercise the office of judge, &c., \* \* or any other office in this state, to which a salary of the state is annexed."

Under this constitution, the defendant was, in fact, discharging, at the same time, the duties of attorney general of the *United States* and recorder of the city of *Philadelphia*. Application was made to the Supreme Court for leave to file an information, in the nature of a writ of *quo warranto*, to inquire by what authority he exercised the duties of the latter office. But it was agreed that the merits of the case should be discussed and declared upon this preliminary motion.

In support of the motion, it was argued that the recorder performed judicial functions by provision of the city charter, and did so "not as a ministerial agent of the corporation, but that he was, in fact and law, a judge, within the meaning of the constitution, and the interpretation of the most authoritative writers."

In opposition, it was premised that the constitution did not include in its prohibition any other than state officers; that the recorder was not an officer of the commonwealth or state, but an officer of the corporation; and that, according to the letter, the spirit and meaning of the constitution, he was not a judge.

A wide array of authority was presented, which will be found cited in the text, and the judges declaring that the question was of too much importance to be decided without deliberation, directed a *curia advisare vult*, until the next term, when the unanimous opinion of the Court was delivered by SHIFFEN, Chief Justice—

"That although the recorder of the city of *Philadelphia* possesses some powers and performs some duties of a judicial nature, he is not a judge within the meaning of the 8th section of the 2d article of the constitution."

VI. And in this connection, as bearing directly upon the question as to what extent *Wallace*, either in his capacity as mayor, or the contingent discharge of the duties of city judge, can be considered as a judicial officer, or, in fact, an officer of any kind under the state, within the meaning of the constitution, we refer to the case of *The State v. Wilmington City*, 3 Harr. 295, where, upon principles similar to those we maintain, it was decided that the office of city treasurer was not a civil office, within the range of certain constitutional prohibitions.

The facts are as follows:

*Hagany*, an ordained and officiating clergyman, had been elected treasurer of the city of *Wilmington*, in violation, as was contended, of the following provision of art. 7 of the constitution of *Delaware*: "No ordained clergyman, or



ordained preacher of the Gospel, of any denomination, shall be capable of holding any civil office in this state."

But in deciding that the office of city treasurer was not a civil office, in contemplation of the clause referred to, which decision was sustained in separate opinions of all the judges, Justice HARRINGTON remarks:

"The principle is, that ordained clergymen shall not be employed in administering the government. It doubtless grew out of a wise determination to keep the affairs of the church separate from affairs of the state. Is this principle fully recognized in excluding clergymen from all offices of the government, properly speaking, or does it require to be extended to offices held under public corporations, and not held under or comprising any part of the state government? The business of the convention was to establish a state government, and to provide the mode of its administration. In speaking of offices, such offices were undoubtedly meant, as were designed for this purpose either directly or indirectly. But the constitution nowhere descends to notice a corporation officer. Such an office forms no part of the state government. It is perfectly immaterial for all the purposes of state government, whether the city of *Wilmington* have a treasurer or no treasurer, and as the existence of such an officer did not enter into the system of government when the convention was forming it, it cannot be supposed that the qualifications or disqualifications which they sought to apply to their officers, were designed by them to be extended and applied to such corporation officers.

But we pass from these considerations to other, equally strong, constitutional objections underlying the position of contestant's counsel.

VII. If it is to be determined that *Wallace*, while mayor, became, by the discharge of judicial duties, incidental or otherwise, such a judicial officer as is contemplated by the constitution, then we contend—

That so much of the act for the incorporation of cities, adopted *March 9, 1857*, as confers the judicial power in question upon an officer charged with executive duties, is in open violation of art. 3 of the constitution, which declares that "The powers of the government are divided into three separate departments—the legislative, the executive, including the administrative, and the judicial—and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this constitution expressly provided." See *Hayburn's case*, 2 Dall. pp. 409, 411; *Story on the Const.*, § 1777; 4 Ind. R. 301.

VIII. Again; so much of the incorporating act as confers the powers of a justice of the peace upon mayors, is void, because violating § 22 of art. 4 of the constitution, as follows:

1. It is special and local legislation regulating the jurisdiction of justices of the peace. See act for incorporating cities, §§ 18, 19.

2. It is unconstitutional as to the tenure of office, substituting two years term in place of four, and requiring no commission before entering upon the duties. Compare §§ 9, 14, of act for incorporation of cities, § 14, art. 7, of the constitution, and § 6 of the justices' act, 2 R. S. p. 450.

3. It is unconstitutional as to the mode of election; the constitution, art 7, § 14, requiring an election by the voters of each township, while all city officers are elected by voters of the city.

IX. Again; if the mayor's Court, or Court of the city judge, be such a Court as is contemplated by the organic law, then so much of the city charter or

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act of incorporation as provides for filling vacancies in the same by justices, or from elections ordered by the common council, is in open violation of § 18, art. 5, of the constitution, which provides that vacancies occurring in the office of the judge of any Court, shall be filled by appointment of the governor, until a successor is elected and qualified. See *The State v. Wilmington City*, 3 Harr., *supra*.

X. If *Wallace* is to be regarded as having been elected to two distinct offices—i. e., mayor and city judge, so much of the incorporating act as has thus created a municipal and judicial office, and then merged both in the possession of the same officer, is void, as in direct conflict with § 9, art. 2, of the constitution, which provides that, "No person shall hold more than one lucrative office at the same time, except as in this constitution expressly permitted."

XI. Nor, while denying that the office resigned by *Wallace* was a judicial office in the sense required, do we regard it by any means as clear, that the one to which he was afterwards elected was within the constitutional inhibition.

The language employed is, "any office of profit or trust, under the state, other than a judicial one."

The word "state" has at least two primary significations, the one geographical, referring to the territory inhabited, and the other civil or politico-legal, representing the aggregated inhabitants, commonwealth, or body politic. It is upon the latter that constitutions are designed to operate, their subject-matter being the general government and political principles of the social organization. The direct object is to provide for state government, and not otherwise than incidentally for that of counties, townships, cities, and inferior organizations. In this view it is contended that the officers strictly contemplated are such as pertain to the state at large, and have immediate responsibility to, and powers arising from, the body politic. An office in a state, and one under it, are not necessarily identical in character; but on the other hand the phrases "office under the state" and "state office" are synonymous.

Are sheriffs such officers under the state, as are reached by the prohibition? We can hardly think so. Is it objected that they are referred to in the constitution? So are coroners, surveyors, and numerous other strictly county or township agents and officials. Is it claimed that they are officers discharging important duties within the state? So are the officers before mentioned, together with judges of the Circuit and District Courts of the *United States*, their clerks and marshals; and equally so are the presidents of banking institutions, insurance and other companies, and the officers of all private corporations. Is it said they are elected? So are a majority of those we have enumerated. But are these, or any of these, to be considered officers, with powers derived directly from, and responsible immediately to, the state organization? In short, are they, in any just sense, officers under the state, or state officers?

On the other hand, is it not true that sheriffs are properly ministerial officers, only, of the Courts for which they act—as regards the Supreme Court, appointed directly by, and responsible to, that body, and, as connected with other Courts, discharging executive duties, restricted in general by the Courts and counties within and for which they have been elected?

Discarding, then, as we do, the tests of constitutional interference, election, and discharge of duties within the state, it may well be asked, by what criterion we are to determine who are officers under the state or state officers, within the prohibition.



Perhaps the readiest answer may be found in the requirements of the constitution, providing as it does in § 18 of art. 5, that vacancies in all state offices shall be filled by temporary appointment by the governor. And again, in § 7 of art. 6, that all state officers shall be liable to impeachment by either or both branches of the General Assembly, as is therein provided.

But the sheriffalty is no such office, and a sheriff, surely, is no such officer. His vacancies, as to Circuit and Common Pleas Courts, are supplied directly by the coroner (2 R. S. p. 13 § 2), and as to the Supreme Court, by a new appointment from that body. Nor are sheriffs liable to impeachment for the causes and before the tribunals mentioned.

But admitting, for argument alone—the contrary of which we claim to have abundantly established—that the office originally held by *Wallace* was a judicial office, we proceed to inquire—

What was the effect produced by a resignation of the mayoralty?

The constitutional prohibition is ineligibility to office during the term for which he shall have been elected. How is this to be interpreted? What is its proper meaning?

Counsel for the contestant, relying, doubtless, on the general maxim, “that it is not allowable to interpret what has no need of interpretation,” argue that the language used is simple and obvious, beyond the reach of Courts, and to be taken literally.

To this we answer, denying the premises assumed, and contending further, that interpretation is not confined alone to ambiguity, obscurity, or other defects of expression, as the maxim seemingly implies, but extends to all cases, however clear the words may be, where the literal sense would lead to false conclusions and decisions (Domat's Civil Law, Prel. B. 4, § 1); that constitutional provisions are to be expounded by the same rules adopted and applied to the construction of statutes (Smith on Const., p. 418); that the provision in question being remedial, and in derogation of natural and civil right, should receive a liberal, and so-called rational construction, such as, under the well known rule of Lord ESKINE, best agrees with its subject matter, and is most promotive of the end in view (Ersk. Inst., B. 1, Tit. 1, § 52.—*Id.* § 58.—Smith on Const., pp. 826, 827.—Vattel, § 280.—Domat's Civil Law, Prel. B., p. 13.—Dwarr. p. 718); that it is the sole object of the interpretation of a statute, to discover the intention of the framers, and that a thing which is within the letter of the statute is not within the statute, unless it be within the intention of its makers (Bac. Abr., Stat. 1.—15 Johns. 380.—5 Term R. 449.—2 Burr, 786.—4 Gill and Johns. 6.—Plowden, 18.—11 Mod. 160); and that in interpretation it is not, in general, a true line of construction to decide accurately by the strict letter of the act; but that Courts will consider what is its fair meaning, and expound it differently in order to preserve the intent. 8 Rep. 27.—Broom's Legal Maxims, 299.—Co. Litt. 381.—Lord Keynon, 7.—Term R. 196.

And to a similar extent run decisions of more modern date.

In giving a construction to any statute, the Court must consider its policy, and give it such an interpretation as may appear best calculated to advance its object (3 Ham. 198); although such construction may seem contrary to the letter of the statute. 3 Cow. 89. And see, also, 1 Miss. R. 147; 2 Har. and Johns. 167; 2 Pet. 762; 1 Pet. 64; 12 Shep. 493; 19 Cow. 292.

We advance, then, the following propositions:

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1. That the constitutional prohibition in question is one which attaches to the office, and not to the person of the incumbent.
2. That by resignation, the officer may determine the term for which he was elected.
3. That the vacancy thus created leaves no ground on which the prohibition can operate, and fully satisfies the true intent and meaning of the constitution.

\* \* \* \* \*

EGGLESTON and Others v. BARNES, Executor.

Saturday,  
June 25.

APPEAL from the *Vanderburgh* Circuit Court.

HANNA, J.—*Barnes*, as executor of *Stockwell*, brought a suit upon three promissory notes, and to foreclose a mortgage given to secure the payment thereof.

The notes were made by *Eggleston* to *Stockwell*, *Carpenter*, and *Ingle*; and the mortgage was made to *Ingle*, for the use of himself, *Carpenter*, and *Stockwell*.

It is averred that *Carpenter* and *Ingle*, upon some agreement not known to the executor, transferred the notes and mortgage to *Stockwell*, by assignment not in writing, and by delivery.

*Eggleston*, *Carpenter*, and *Ingle*, are made defendants.

There was a judgment by default, and a foreclosure of the equity of redemption, as to all the defendants.

It is now insisted that the judgment is erroneous, because there is nothing upon the record showing the assignment, and because the equity of redemption of *Carpenter* and *Ingle* was foreclosed.

As to the first point, an equitable assignment is shown, and the statute authorized the proceeding in the form adopted. The default admitted the truth of the averments, as to the assignment and delivery, &c. *Clearwater* v. *Rose*, 1 Blackf. 138.—8 Ind. R. 451.—2 R. S. p. 28. As to the other point, *Ingle* and *Carpenter* had no equity of redemption to foreclose; and as to them, the entry is a mere misprision of the clerk, without injury.



*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs. May Term,  
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*C. Baker* and *O. H. Smith*, for the appellants.

*A. L. Robinson*, for the appellee.

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### MARTIN v. THE JUNCTION RAILROAD COMPANY.

APPEAL from the *Fayette* Circuit Court.

*Saturday,  
June 25.*

*Per Curiam.*—This was an action to recover the amount subscribed to said road, and is in all respects similar to those of *McCray* against the same company, 9 Ind. R. 358, and *Booe* against the same, 10 *id.* 93; and for the reasons there given, the judgment on demurrer to the answer setting up the facts, &c., is reversed.

The judgment is reversed with costs. Cause remanded, &c.

*J. S. Reid* and *S. Heron*, for the appellant.

*S. W. Parker* and *J. C. McIntosh*, for the appellees.

### JACKSON v. HART.

Complaint as follows: That on, &c., plaintiff and defendant, at, &c., were partners in the business of, &c.; that on or about said day, they dissolved partnership, and plaintiff sold his interest to defendant for the sum of 466 dollars, and defendant gave his notes for 398 dollars, and assumed the payment of ——— due from plaintiff to *L.*, which said defendant refused to pay, which sum was 88 dollars, 48 dollars whereof the defendant paid said *L.*; and that said *L.* also assumed the payment of 83 dollars, 50 cents, due from plaintiff to *M.*, which said defendant refused to pay, and said *M.* sued plaintiff and recovered the sum specified, to the damage, &c.; wherefore, &c. *Held*, bad on demurrer.



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Tuesday,  
June 28.

APPEAL from the *Hancock* Court of Common Pleas.  
WORDEN, J.—Complaint by *Hart* against *Jackson*, as

follows, viz.:

“Plaintiff complains, &c., and says that on the 19th day of *May*, 1854, the said plaintiff and defendant, at, &c., were partners in the business of carriage-making, and that on or about said day said plaintiff and defendant dissolved partnership, and that plaintiff sold his interest in the partnership concerns to said defendant for the sum of 466 dollars, and that said defendant gave his notes for the sum of 338 dollars, and assumed the payment of the sum of — due from the plaintiff to *George Landis*, which said defendant refused to pay, which sum was 88 dollars, 48 dollars whereof the defendant paid said *Landis*, and that said *Landis* also assumed the payment of the sum of 83 dollars, 50 cents, due from plaintiff to one *John McGraw*, which said defendant refused to pay, and that said *McGraw* sued said plaintiff and recovered the sum above specified from said plaintiff, to the damage of the plaintiff 200 dollars; wherefore,” &c.

A demurrer to this complaint, assigning for cause that it does not state facts sufficient to constitute a cause of action, was overruled, and the defendant excepted. Such proceedings were afterwards had as that judgment was rendered for the plaintiff for 94 dollars, 29 cents.

We are of opinion that the complaint does not contain any good cause of action, and that the demurrer to it should have been sustained. The notes mentioned are evidently not intended to be made the basis of the action. They are not set out, nor is their payment negatived. To whom the defendant assumed the payment of the claims due from the plaintiff to *Landis* and to *McGraw*, does not appear except by inference. Indeed, so far as the *McGraw* claim is concerned, the allegation is that *Landis* assumed the payment of it, but this probably is a clerical error. The main objection to the complaint, however, is, that it does not appear upon what consideration the defendant's assumption of the *Landis* and *McGraw* claims was based.



If the complaint be construed to mean that the defendant promised the plaintiff to pay the claims specified, still it is not averred that the promise was made in consideration of the sale to the defendant by the plaintiff of his interest in the partnership concerns, nor is any other consideration averred. Indeed, the inference that the promise alleged was in consideration of such sale, if otherwise it could be drawn, is repelled by the facts stated. The sale is alleged to have been for 466 dollars. Notes were given for 338 dollars, and if the 88 dollars due to *Landis*, and the 83 dollars, 50 cents, due to *McGraw*, are to be included as the consideration for the sale, we have the sum of 609 dollars, 50 cents, which considerably overruns the amount to be given. Under these circumstances, we cannot infer that the promise to pay the specified debts was made in consideration of the sale mentioned; and such facts not being averred, the promise stands without any consideration to support it, and is *nudum pactum*. All ambiguities are to be construed most strongly against the pleader. *Tercy v. Strain*, 2 Ind. R. 113. Applying this rule to the case before us, it is clear that no ground of action appears in the complaint.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for further proceedings not inconsistent with the opinion.

*R. A. Riley*, for the appellant.

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DEARMOND  
v.  
BOHN.

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DEARMOND and Others v. BOHN and Others.

The pendency of an action in one state cannot be pleaded in abatement of an action between the same parties and for the same cause, in another state. The third clause of § 80, 2 R. S. p. 38, must be construed accordingly.

APPEAL from the *Decatur* Court of Common Pleas.

Tuesday,  
June 23.

WORDEN, J.—Suit by the appellees against the appellants on a note.



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DEARMOND  
v.  
BOHN.

The defendant answered, in abatement, that on the — day of *January*, 1858 (which was before the commencement of this suit), the plaintiffs commenced a suit on the note sued on in this case, in the Common Pleas Court of the county of *Hamilton*, and state of *Ohio*, and had process served on *Thomas DeArmond*, one of said defendants, and garnishee process served on *Robert Armstrong* and *Peter Smith*, as debtors of said defendants, or some of them; that said suit is still pending in said Court, undisposed of, and not dismissed; wherefore, &c.

To this answer the plaintiffs demurred, on the ground that it did not state facts sufficient to abate the suit.

The demurrer was sustained, and such further proceedings were had as that final judgment was rendered for the plaintiffs.

The defendants appeal, and assign for error the ruling of the Court upon the demurrer to the answer.

We are of opinion that the demurrer was properly sustained.

It is settled that the pendency of an action in one state cannot be pleaded in abatement of an action between the same parties and for the same cause, in another state. *Bowne v. Joy*, 9 Johns. 221.—*Walsh v. Durgin*, 12 *id.* 99.—*McFilton v. Love*, 13 Ill. R. 486. In the case in 12 Johnson, it is said by the Court that, "The rule in the *English* Courts is, that the pendency of a suit in a foreign Court, by the same plaintiff against the same defendant, for the same cause of action, is no stay or bar to a suit instituted in one of their Courts. It is the definitive judgment on the merits only, which is by them considered conclusive, and we have frequently declared so as to suits instituted in the Courts of our sister states. \* \* \* The reasons are that the judgment, at least, if not a recovery in one suit, might be pleaded *puis darrein continuance* to the other suit, and if the two suits should proceed *pari passu* to judgment and execution, a satisfaction of either judgment might be shown upon *audita querela*, or otherwise, in discharge of the other."

The pendency of a prior action in the Courts of the



state, between the same parties, for the same cause, is matter of abatement. See cases collected in Ind. Dig., p. 6. May Term. 1859.

We are of opinion that the third clause of § 50, of the code (2 R. S. p. 38), providing that a demurrer may be filed where it appears on the face of the complaint "that there is another action pending between the same parties for the same cause," must be construed to mean actions pending in the state, and not out of it. HUMPHRIES  
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*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*J. Gavin* and *O. B. Hord*, for the appellants.

*J. S. Scobey* and *W. Cumbach*, for the appellees.

12 609  
162 178

#### HUMPHRIES v. THE ADMINISTRATORS OF MARSHALL.

Suit against an administrator upon a promissory note purporting to have been made by his decedent. Answer, *non est factum*. There was conflicting evidence as to the handwriting of the deceased. Verdict and judgment for the defendant. In support of a motion for a new trial on the ground of newly discovered evidence, the plaintiff filed an affidavit setting forth "that, on the morning after the trial, he was for the first time informed that a certain *B.* knew something about the claim that he had upon the estate of *M.*, deceased, and upon a note that was before the Court for investigation on yesterday; that he was this morning informed that Mrs. *B.* knew something of the matter in issue that was material, and forthwith procured her affidavit; that he can have the evidence of Mrs. *B.* if he can have a new trial; that she lives in the city of *Madison*, and he can have her evidence, and if he had known, or had the means of knowing it, he would have had her testimony when the cause was tried; that his claim is just, and that said *M.* made said note, is absolutely true, and were he alive no objection would ever have been made; that he wishes a new trial for justice only." The affidavit of Mrs. *B.* sets forth "that in the month of *January*, 1853, she was in the store of the plaintiff in *Madison*, and *M.*, since deceased, came in, and a talk commenced about a certain note that *H.* held against *M.*, and *M.* made a payment upon the note in her presence; that she heard the amount named that he paid; but is not certain what the amount was, but it was between 20 dollars and 40 dollars, or thereabouts; that she saw it counted and laid in two piles, the small bills were put together in one pile, and the larger bills in another; that the money was all bank bills; that she saw the note, and heard *H.* read to *M.* payments made upon the note as marked upon it; that some



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of the payments were made by other persons than *M.*; that one of the payments was made by *H.*, one by *P.*, one by *J.*, and another by *H.* She well recollects that *M.* said he would pay the balance of the note between that time and the spring; that she was waiting there to buy some goods, and had to wait until they got through. She does not recollect that she heard the amount of the note exactly; but from all she heard, she thinks it was a considerable amount."

*Held*, 1. That the facts sworn to by Mrs. *B.* identified the note, and, in the state of the evidence, might have changed the result.

2. That the lateness of the discovery of the evidence was not owing to a want of diligence.

3. That the evidence would not have been merely cumulative.

4. That written reasons for a new trial are sufficient, if they, with reasonable certainty, apprise the Court and the opposite party of the ground upon which the new trial is asked. The language of the statute need not be followed.

Tuesday,  
June 28.

APPEAL from the *Jefferson* Court of Common Pleas.

WORDEN, J.—The appellant filed, in the Common Pleas Court, his claim against the estate of *Joseph G. Marshall*, deceased, consisting of a note purporting to have been executed by the decedent to the appellant for the sum of 365 dollars, dated at *Madison*, May 15, 1847, and payable one year from date. On the note were indorsed credits of payment, as follows, viz:

"January 5, 1853.	By cash on within note, Cr...	\$20 00
June 10, 1848.	Note on Dr. <i>Hodge</i> .....	19 89
June 10, 1848.	Note on <i>J. C. Patton</i> .....	12 50
June 10, 1848.	Note on <i>S. C. Hoyt</i> .....	60 00
May 9, 1850.	Note on <i>Joyce</i> .....	8 44
May 9, 1850.	Note on <i>J. C. Patton</i> .....	29 13
May 9, 1850.	Note on <i>Jas. C. Leavitt</i> .....	13 69
January 15, 1853.	Cash and fee.....	23 00

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\$166 65"

The claim was properly sworn to by the appellant.

The administrators of *Marshall* appeared and filed an answer denying the execution of the note by the decedent, which was verified. Replication that the decedent did execute the note.

The issue thus formed was tried by a jury, who returned a verdict for the defendants. A motion for a new trial,



made by the plaintiff, was overruled, and judgment entered on the verdict.

The reasons filed for a new trial were, that the verdict was contrary to law and evidence; alleged error in instructions to the jury; and newly discovered testimony.

It appears, by a bill of exceptions, that on the trial, the plaintiff offered and gave in evidence the note in question, and proved by sundry witnesses, who were acquainted with the handwriting of the decedent, that the signature to the note in question was, in their opinion, in the handwriting of the decedent. The defendants thereupon called sundry witnesses acquainted with the handwriting of the decedent, who deposed that, in their opinion, the signature to the note in question was not in the handwriting of the decedent. This was all the evidence given in the cause.

The plaintiff asked that certain papers, containing the signature of the decedent, go to the jury, for the purpose of instituting a comparison of handwriting; but the Court ruled against him. The point, we think, is not legitimately before us, as this was not made a ground of the motion for a new trial; hence we shall not discuss the correctness of the ruling.

In support of the motion for a new trial, on the ground of newly discovered evidence, the plaintiff filed an affidavit, setting forth that on the morning after the trial, he was, for the first time, informed that a certain *Eliza Bethrick* knew something about the claim that he had upon the estate of *Joseph G. Marshall*, deceased, and upon a note that was before the Court for investigation on yesterday; that he was this morning informed that Mrs. *Bethrick* knew something of the matter in issue that was material, and forthwith procured her affidavit; that he can have the evidence of Mrs. *Bethrick* if he can have a new trial; that she lives in the city of *Madison*, and he can have her evidence, and if he had known, or had the means of knowing it, he would have had her testimony when the cause was tried; that his claim is just, and that said *Marshall* made said note is absolutely true, and were he alive no objection

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May Term, 1859. would ever have been made; that he wishes a new trial for justice only.

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The affidavit of Mrs. *Bethrick* sets forth that in the month of *January*, 1853, she was in the store of the plaintiff in *Madison*, and *Joseph G. Marshall*, since deceased, came in, and a talk commenced about a certain note that *Humphries* held against *Marshall*, and *Marshall* made a payment upon the note in her presence; that she heard the amount named that he paid, but is not certain what the amount was, but it was between 20 dollars and 40 dollars, or thereabouts; that she saw it counted and laid in two piles, the small bills were put together in one pile, and the larger bills in another; that the money was all bank bills; that she saw the note, and heard *Humphries* read to *Marshall* payments made upon the note, as marked upon it; that some of the payments were made by other persons than *Marshall*; that one of the payments was made by *Hodges*, one by *Patton*, one by *Joyce*, and another by *Hoyt*. She well recollects that *Marshall* said he would pay the balance of the note between that time and the spring; that she was waiting there to buy some goods, and had to wait until they got through. She does not recollect that she heard the amount of the note exactly, but from all she heard she thinks it was a considerable amount.

The facts sworn to by Mrs. *Bethrick*, seem to identify the note in controversy; and, in the state of the evidence presented by the record, we think her testimony would most likely have changed the result. See *Bronson v. Hickman*, 10 Ind. R. 3. We are of opinion that the lateness of the discovery of the evidence, was not owing to a want of diligence on the part of the plaintiff. It is urged on behalf of the appellees, that it does not appear that the plaintiff had made any search or inquiry for this or similar evidence; and, also, that he must have known of the existence of this evidence, as the facts sworn to by the proposed witness, transpired, if at all, in the presence of the plaintiff. We think it not reasonable to suppose that the plaintiff would be likely to remember whether any one, or who, if any one, was in his store at the time of the transaction



alluded to, particularly after the lapse of so long a time; and, in our opinion, reasonable diligence did not require him to institute general inquiries to ascertain whether some one of the numerous persons that may have been in the habit of buying goods at the store, might not have happened to be present, and to overhear the conversation.

It is insisted that the evidence is but cumulative, and therefore, that the motion was properly overruled.

The only evidence given was the opinion of the witnesses as to the handwriting of the deceased. That proposed by the newly discovered witness involves no opinion whatever, but shows an admission by the deceased, by his action and conduct, of the making of the note. The evidence all tends to the same point, viz., the making of the note by the deceased, but it is totally different in kind. In 1 Greenl. Ev., § 2, it is laid down that "Cumulative evidence is of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of a party, evidence of another verbal admission of the same fact is cumulative; but evidence of other circumstances tending to establish the fact, is not."

This exposition we deem correct, and tested by this rule, the evidence was not cumulative merely; and, therefore, the case does not come within the rule established by numerous cases in this Court, that a new trial will not be granted on the ground of newly discovered evidence which is merely cumulative to that given on the trial.

Another objection, somewhat technical in its character, is made, which is, that the reason for a new trial on this ground, as assigned in writing, is wholly insufficient, being merely "newly discovered evidence."

It is insisted that the written reason, in order to be valid, should set out fully that the application was made on the ground of "newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced on the trial," in the language of the statute providing for a new trial in such cases.

We are of opinion, however, that such strictness is not in harmony with the general spirit of the code, and that in

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many instances it would have a tendency to defeat rather than subserve the ends of justice. The reasons filed for a new trial are sufficient, if they, with reasonable certainty, apprise the Court and the opposite party of the ground upon which the new trial was asked. This, we think, was done in the present case. The written reasons were abundantly sufficient to inform the defendants that a new trial was asked on the ground, amongst other things, of "newly discovered evidence," and under the application thus made, the plaintiff was entitled to make such a showing as, by the law of the land, would entitle him to a new trial. This, we think, he did; hence, a new trial should have been granted.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for a new trial.

*S. C. Stevens*, for the appellant.

*J. Y. Allison*, *W. M. Dunn*, and *J. W. Hendricks*, for the appellees.



### HOLLOWELL and Others v. CHEEK and Others.

Tuesday,  
June 28.

APPEAL from the *Dearborn* Circuit Court.

*Per Curiam*.—This was a bill in chancery, filed under the former practice, but tried since the taking effect of the present code. The cause was tried by the Court, and there was a finding and judgment, in respect to some matters involved, for the defendants. The complainants moved for a new trial, but no written reasons therefor appear to have been filed. The rulings alleged to have been erroneous, should have been presented as the ground of the motion for a new trial. *Vide Kent v. Lawson*, at the present term (1).

There having been no written reasons for a new trial, filed in the Court below, no question is presented for con-



sideration here. *Howes v. Halliday*, 10 Ind. R. 339. See, May Term, 1859.  
also, *McGregor v. Axe*, *id.* 362.

The judgment is affirmed with costs.

*E. Dumont* and *W. S. Holman*, for the appellants.

*D. S. Major*, for the appellees.

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(1) See the last case in this volume.

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### MONTGOMERY v. TATE.

At common law, a husband became entitled by marriage to an estate in the lands of his wife during their joint lives; and such estate was as absolute during that period, as if acquired by conveyance or in any other mode; and it was subject to sale on execution against him, and might be conveyed by him.

The statute of 1838 did not change the law in this respect.

The death of the husband leaving the wife surviving, would, *it seems*, terminate such an estate conveyed by a sheriff; but the deed would be good for whatever interest the husband had, for the lifetime of the wife.

APPEAL from the *Fayette* Circuit Court.

Tuesday,  
June 28.

WORDEN, J.—This was an action by the appellee against the appellant, to recover the possession of a certain piece of land described in the complaint. There are two paragraphs in the complaint, one claiming a fee simple, and the other a life estate in the land.

Answer in denial. Trial by jury; verdict and judgment for plaintiff, over a motion for a new trial.

By a bill of exceptions it appears, that on the trial the plaintiff proved, *prima facie*, a title to the land in herself, either in fee simple or for life; but whether her evidence established, *prima facie*, a fee simple interest in her, or a life estate merely, it is wholly unnecessary to determine for the purposes of this case; therefore we shall express no opinion in reference to it.

After the plaintiff became seized of the premises, she intermarried with one *John B. Tate*, who is still living, and



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the husband of the plaintiff. Afterwards, in *September*, 1840, *Bates* and *Abrams* recovered a judgment in the *Fayette* Circuit Court against *William Tully* and the said *John B. Tate*, for the sum of 177 dollars, 60 cents, besides costs of suit, on which an execution was afterwards issued, which was levied upon the property in controversy, as the property of said *John B. Tate*, "for and during the natural life of *Ursula Tate*, wife of said *John B. Tate*;" and the property, on a *venditioni exponas*, was afterwards sold, according to law, to satisfy the judgment and costs.

*James Miller* and *Sanford P. White* became the purchasers at the sheriff's sale, and received his deed for the premises, conveying to them the interest of said *John B. Tate* therein during the lifetime of his wife, *Ursula Tate*. This took place in 1842. *Miller* and *White* afterwards conveyed to *Elisha Vance*, and *Vance* to the defendant, *Montgomery*.

On these facts, the Court charged the jury, "that if they believed the evidence, it would be their duty to find for the plaintiff."

The defendant asked several charges, to the effect that if the jury believed the propositions relied upon by defendant in support of his title (substantially those contained in the evidence), it would be their duty to find for the defendant. These were refused, and the defendant excepted to the ruling of the Court in giving and refusing the charges.

At common law, by the marriage of *Ursula* with *John B. Tate*, he became entitled to an estate in her lands during their joint lives. This estate is as absolute and perfect in him during that period, as if acquired by conveyance, or in any other mode. It is subject to sale on execution against him, and may be conveyed by him. *Vide* 2 Kent's Comm. 131; *Butterfield v. Beall*, 3 Ind. R. 203; *The Junction Railroad Co. v. Harris*, 9 *id.* 184.

But it is contended that the law of 1838 (R. S. 1838, p. 276, § 1), in force at the time of the sale in question, subjecting property to sale on execution, does not authorize such estates to be sold on execution. It provides, "that the personal and real estate of every individual," &c., "in-



cluding his, her, or their goods, chattels, lands, tenements, and hereditaments, be and the same are hereby made subject to execution," &c.

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The counsel say that, "Nowhere do they find any law authorizing the selling of the wife's interest in land for the debts of her husband."

No interest of the wife is sold; for the entire estate in the land is, by the marriage, vested in the husband during their joint lives. During their joint lives she has no estate in the lands. Such estate being vested in the husband, it is very clearly within the terms of the statute, and subject to sale on execution against him.

Subsequent legislation has, perhaps, changed this rule. See Acts of 1847, p. 45, and 1 R. S. p. 321, § 5. But these acts can have no influence on the case at bar, as the sale here took place before either of them was enacted.

A contingency may arise that will abridge the term conveyed by the sheriff's deed, to a less period than that of the life of said *Ursula*. The death of said *John B.* leaving her surviving him, would, perhaps, terminate the estate conveyed; but this does not at all vitiate the deed. It would be good for whatever interest he had in the premises, not extending beyond the lifetime of said *Ursula*.

Both husband and wife being still alive, the term conveyed by the sheriff's deed is not yet expired, and the defendant's title to premises derived from such sale, still subsists.

The ruling of the Court was wrong, and the judgment must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for a new trial.

*B. F. Claypool*, for the appellant.

*J. S. Reid*, for the appellee.



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1859.

LEPPERT v. THE STATE.

BANKS  
v.  
HEMPSTEAD.

Tuesday,  
June 28.

APPEAL from the *Tipppecanoe* Court of Common Pleas.  
*Per Curiam*.—This was a prosecution under the liquor law of 1853, and falls within the ruling of this Court in *Meshmeier v. The State*, 11 Ind. R. 484.

The judgment is reversed with costs. Cause remanded, &c.

*W. C. Wilson, W. F. Lane, and J. M. La Rue*, for the appellant.

*J. L. Miller*, for the state.

BANKS v. HEMPSTEAD.

Tuesday,  
June 28.

APPEAL from the *Laporte* Court of Common Pleas.  
*Per Curiam*.—*Hempstead* sued *Banks* upon a promissory note for the payment of 149 dollars.

Defendant answered—

1. That the note was obtained by fraud.
2. That it was given without consideration.
3. That the consideration upon which it was given had failed, setting forth specially the facts constituting the failure.

In this condition, the cause was continued to the *February* term, 1857. On the fourth day of that term, the case was called, and the plaintiff not appearing, though his attorney was called, it was, upon the defendant's motion, continued. Afterwards, on the same day, the plaintiff appeared by his attorney, and moved, upon affidavit, to set aside the continuance; but his motion was overruled, and no exception was taken. And afterwards, on the fifth day of the term, he again, upon an additional affidavit, moved to set aside the same continuance. Pending this motion, the defendant moved for time to prepare and file counter-



affidavits; but his, the defendant's, motion was overruled, the plaintiff's sustained, and the continuance set aside. **May Term, 1859.**  
And to these rulings, the defendant excepted.

On the sixth day of the term, the cause was submitted to the Court for trial, and upon the trial, the plaintiff gave in evidence the note sued on, and rested; and the defendant having given part of his testimony, the plaintiff moved for leave to file a reply, which motion was, over the defendant's objection, sustained, and the plaintiff replied to the answer by a general denial.

The Court, having heard the evidence, found for the plaintiff. And thereupon the defendant moved for a new trial on three grounds—

1. That the finding is contrary to law.
2. That the same is contrary to the evidence.
3. Newly discovered testimony.

This motion was overruled, but no exception was taken. The Court rendered judgment upon the finding, &c.

As the refusal to sustain the motion for a new trial was not made the subject of an exception, the action of the Court relative to that motion is not properly before us, and the case stands in this Court as though no such motion had been made. As we have seen, the exceptions taken relate to the setting aside of the continuance, the refusal to give time to file counter-affidavits, and the leave given to reply. And there being, in effect, no motion for a new trial, the result is, the point involved in the exceptions are not examinable in this Court. See *Kent v. Lawson*, at the present term (1).

The judgment is affirmed with 10 per cent. damages and costs.

*J. W. Chapman* and *J. B. Merriwether*, for the appellant.

(1) See the last case in this volume.



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1859.

THE PRESIDENT, &C.

v.  
THE CITY  
OF INDIAN-  
APOLIS.

THE PRESIDENT AND DIRECTORS OF THE INDIANAPOLIS AND  
BELLEFONTAINE RAILROAD COMPANY v. THE CITY OF  
INDIANAPOLIS.

KETCHAM v. THE SAME.

To constitute a dedication, there should be a clear intention to devote the ground claimed to have been dedicated to the use of the public.

Square 50 in the town of *Indianapolis* was dedicated to the public as a market space, by the action of the commissioners appointed to lay off said town pursuant to the act of 1821. (Acts of 1821, p. 44, § 4.) By an act of 1837, the south half of said square was exchanged for a part of the north half of square 48, and deeds in fee simple made. The deed to the town of *Indianapolis*, though it recites that it was given in consideration of the south half of square 50, does not express the purpose of the grant.

*Held*, That by the act of 1837, the part of square 40 was dedicated to the public in lieu of the half of square 50; and that act, being a public one, entered into and formed a part of the deed, and rendered a statement in the deed of the purpose of the grant unnecessary.

*Held*, also, that said part of square 48, having been so dedicated, it could not be sold on an execution against the corporation of *Indianapolis*.

*Tuesday,*  
*June 28.*

APPEAL from the *Marion* Circuit Court.

DAVISON, J.—The case made by the record is substantially as follows: An act entitled “An act appointing commissioners to lay off a town on the site selected for a permanent seat of government,” approved *January* 6, 1821, directed the commissioners to appoint a surveyor, who, after laying off the town, should make out two complete copies of the plan of said town on parchment or paper, designating, *inter alia*, the contents of each square that may be noted on the plan thereof as public ground, and for what intended, whether for civil or religious purposes. Acts of 1821, p. 44, § 4. Under this act, the town of *Indianapolis* was laid out, and the plan thereof duly recorded in the recorder's office of *Marion* county, and upon said plan the south half of square No. 50 is designated “*Market-space*.” By an act approved *February* 6, 1837, entitled “An act authorizing an exchange of certain grounds in *Indianapolis*, between the town and state,” it was provided “That the board of internal improvement should take pos-



session, for the use of the state, if they should deem it for her interest so to do, of the south half of square No. 50, which was granted to *Indianapolis* by an act approved *January 6, 1821*; and in lieu thereof to set apart such portion of the north half of square No. 48, yet owned by the state, as they shall deem just to said town, for a 'market-space;' and upon the corporate authorities of that town agreeing, by order on their books, to receive such part of square No. 48, so to be set off as aforesaid, then the agent of state for *Indianapolis* is hereby authorized, and it is made his duty, to give said town a deed for the same in fee. And the corporate authorities shall, at the same time, relinquish to the state by deed all of said half square No. 50, which deed shall be given to said board of internal improvement," &c. Local Acts of 1837, p. 411, § 1.

In pursuance of this act, that board, on the 16th of *June, 1837*, "Ordered, that lots numbered 1, 3, 10, 11, and 12, in square No. 48 in *Indianapolis*, be set apart to said town, in lieu of the south half of square No. 50, taken possession of by the state for the use of water power, &c., provided the corporate authorities of the town shall accept said part so set apart, &c., as aforesaid, and make a deed to the state for 'half square No. 50,' pursuant to the act approved *February 6, 1837*."

On the 3d of *July, 1837*, the trustees of *Indianapolis* ordered "that the north half of square No. 48, being lots numbered 1, 3, 10, 11, and 12, be accepted in lieu of the 'half square No. 50,' and that a deed be made to the state pursuant to the requirements of the act of *February, 1837*." And afterwards, on the 24th of *January, 1838*, they, the trustees, made such deed, which, after reciting substantially the said act, the above order of the board of internal improvement, and the order of said trustees, conveyed to the state, in fee simple, the aforesaid "half square No. 50." And the deed thus made expressly recites that that square is "conveyed in lieu of the north half of lot No. 48, so set apart by the board of internal improvement to the town of *Indianapolis*, as aforesaid."

After this, on the 21st of *June, 1838*, *Thomas H. Sharpe*,

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the then agent of state for the town of *Indianapolis*, executed and delivered to the common council of said town, and their successors in office, a deed of conveyance in this form: "That the said agent, for and on behalf of the state, in pursuance of the provisions of the law of *Indiana*—'An act appointing commissioners to lay off a town on the site selected for the permanent seat of government, approved *January* 6, 1821'—and in consideration of the south half of square No. 50, known as the market-space, which has been deeded to the state, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said common council, and their successors in office and assigns forever, all the following described lots in the town of *Indianapolis*, *Indiana*, viz., lots numbered 1, 3, 10, 11, and 12, in square No. 48, together with all and singular the appurtenances thereunto belonging, &c., to have and to hold the premises hereby bargained and sold, to the only proper use and behoof of the said common council and their successors in office and assigns forever. In testimony whereof," &c.

This deed was duly recorded in the recorder's office of said county on the 7th of *October*, 1838.

At the fall term of the *Marion* Circuit Court in the year 1847, one *John L. Ketcham* recovered a judgment against the city council of *Indianapolis* for 237 dollars, upon which an execution was issued. By virtue of this execution, a portion of said square No. 48, including lot No. 10, was levied upon, and duly advertised for sale, and on the 24th of *August*, 1848, being the day of sale, was sold to *John L. Ketcham*, who received a sheriff's deed pursuant to the sale. After this, in *September*, 1849, *Ketcham*, by deed in fee simple, conveyed the lot by him purchased at sheriff's sale, to *John M. Talbott*. And afterwards, on the 3d of *October*, 1849, *Talbott*, by a similar deed, conveyed the same lot to the appellants, who were the defendants below. The city of *Indianapolis*, as successor of the town of *Indianapolis*, claims title to said lot, and as such, in this action recovered a judgment in the Circuit Court against



the defendants for possession, &c. Defendants appeal to this Court. May Term, 1859.

In support of this recovery, it is insisted that the lot in controversy, being a part of the north half of square No. 48, was dedicated by the state to a public use, namely, "a market-space," and was not, therefore, subject to sale on execution; while on the other hand, it is contended that a dedication for any purpose is not shown by the case made by the record. Which of these positions is correct?

To constitute a dedication, there should be a clear intention to devote the ground claimed to have been dedicated to the use of the public. *Pennington v. Willard*, 1 R. I. R. 98.—*The City of Cincinnati v. White*, 6 Pet. 435. And whether, in this instance, such intention existed, is to be determined by reference to the act of February 6, 1837, and the various subsequent transactions which resulted in the conveyance of the half of square No. 48 to the town of *Indianapolis*. As we have seen, the act of 1837 plainly recognizes the south half of square No. 50 as having been granted for "a market-space," and proposes, in lieu thereof, to grant the north half of square No. 48 for a similar purpose. This was simply a proposal to change the location of the "market-space," in order that the interest of the state might thereby be accommodated. It is therefore evident that the legislature, by the act to which we have referred, intended that the property proposed to be given in exchange for the "market-space" should, when accepted by the town of *Indianapolis*, be devoted to the same purpose. And the corporate authorities of the town, having acceded to the proposal, must be presumed to have acted, in making the exchange, with a like intention. Indeed, the city of *Indianapolis* never had any title to the "half of square No. 48," save that which is founded on the act of 1837; and when it is noted that that act defines the purpose for which the square in question should be granted, it cannot be assumed that she ever held it for any purpose other than that defined in the act. It is true, the deed from the agent of state to the common council of *Indianapolis*, though it recites that it was given in consideration

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of the "half of square 50," does not express the purpose of the grant. But that defect, if it be one, when considered in reference to the entire case, is not material; because the deed, to be at all operative, must be regarded as having been executed pursuant to the act of *February*, 1837. To make the deed, the agent had no authority save that which he derived from that act. And the same act, being a public statute, in legal contemplation, has entered into, and constitutes a part of, the agent's deed to the common council. 4 Blackf. 234.—13 Mass. R. 16.—7 Ind. R. 373.—10 *id.* 534.

In our opinion, the case stands upon the same ground upon which it would have stood had the deed recited the act of 1837, and, in addition, expressed the special purpose of the conveyance.

It follows that the "half of square 48" was granted for a public use, viz., "a market-space," and was accepted for that use and no other.

The next question to settle is, was lot No. 10, being included within the "market-space," subject to sale on execution? It is, indeed, very clear that that "half square," having been granted for a particular purpose, the corporate authorities would have no right to dispose of it by sale, or otherwise use it in a way different from the object for which it was granted. 2 Smith's Lead. Cas. —, and cases there cited. And it would seem to follow, that its purpose could not be changed by a judicial sale. The corporation of *Indianapolis* is, in respect to the half square in question, a mere trustee, holding it for a special public use; and it cannot, therefore, be made subject to the payment of corporate debts. 7 How. 220.—6 Hill, 407.—4 J. J. Marsh. 597.

Our opinion is, that the sheriff's sale, in this instance, is a nullity, and that the several deeds following that sale are inoperative.

*Per Curiam.*—The judgment is affirmed with costs.

*S. Yandes* and *C. C. Hines*, for the appellants.

*S. V. Morris* and *N. B. Taylor*, for the city.



## WEDDLE v. STONE.

May Term,  
1859.

WEDDLR	12	cts
v.	147	cts
STONE.		cts

Where *A.* agreed with a surviving partner that if the latter would apply the assets of the firm to the payment of an individual debt of the deceased partner, he, *A.*, would pay the debts of the firm, it was held, that a right of action would accrue upon the breach of the undertaking by *A.*, and that the measure of damages would be the amount that was to have been paid by *A.*

APPEAL from the *Hendricks* Court of Common Pleas. *Tuesday, June 28.*

HANNA, J.—*Stone* averred in his complaint, that he and one *E. Weddle*, the brother of the defendant, were partners, &c.; that *E. Weddle* died leaving the firm property, about 600 dollars, and the debts about the same, and the estate of *Weddle* insolvent; that defendant unlawfully intermeddled, took possession of, and converted to his own use, part, &c., to the amount of 300 dollars.

In the second paragraph, he averred the partnership, &c., and that *Weddle* owed one *Perkins*, of *Lafayette*, 600 dollars, on which there was security, and that defendant immediately upon the death of the brother of defendant, urged the plaintiff to transfer to said *Perkins*, the firm property in discharge of the debt of *Weddle*, which plaintiff refused to do unless provision was made for the debts of the firm, and that defendant promised that he would pay all the firm debts in consideration that plaintiff would so transfer, &c., and that plaintiff accepted said proposition and promise, and transferred, &c., to the amount of 700 dollars; but that defendant has wholly failed to pay, &c. The fourth paragraph averred that defendant was indebted to plaintiff 700 dollars for goods, &c., sold and delivered by plaintiff to defendant; and the fifth, that defendant was indebted to plaintiff 700 dollars for goods, &c., delivered to *C. G. Perkins* by plaintiff, at the special instance and request of defendant.

The answer was—

1. A general denial.
2. That the firm was, at the death of said *Weddle*, indebted to said defendant in the sum, &c.

Reply, denying, &c.



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1859.

WEDDLE  
v.  
STONE.

Trial by a jury; verdict for the plaintiff for 424 dollars, 83 cents; and judgment over a motion for a new trial. Defendant appealed.

There is but one point made and insisted upon by the appellant, and under the rule we will not notice any others, and that is, that a new trial should have been granted, because the verdict of the jury was contrary to the law and the evidence; that there was no evidence that *Stone* had paid any portion of the debts of the firm since the death of *Weddle*, and, therefore, he should not have recovered, or, if anything, nothing more than nominal damages, until he had so paid.

The averments in the complaint show, not merely an undertaking to indemnify the plaintiff, but an affirmative promise to do a certain thing, and that was, to pay the debts of the firm of *Weddle* and *Stone*, and that such undertaking had not been kept. There are numerous authorities to the effect that a right of action accrues, upon the breach of such an undertaking, by a failure to pay, &c. (*Churchill v. Hunt*, 3 Denio, 322.—*Port v. Jackson*, 17 Johns. 246; and see cases cited in note to *Tate v. Booe*, 9 Ind. R. 16); and that the measure of damages is, the amount that was to have been paid by the terms of said undertaking.

But it is said that the case in 9 Ind. R. above cited, and that of *Schooley v. Stoops*, 4 Ind. R. 130, establish a different doctrine in this Court.

Without critically examining the question, whether the facts in each of the cases cited, are so analogous as to bring them both within the same rule of decision, we think that there is so marked a difference in the state of facts in this case, as will enable us to decide it, without regard to the determination there arrived at.

In the case in 4 Ind. R., *Schooley* sold and conveyed to *Stoops* and others, a tract of land, and received the consideration. The land was encumbered by a mortgage, to secure the satisfaction of which, in a certain time, *Schooley* and another executed a bond to *Stoops*, &c. *Schooley* did not pay it within the time. Suit by *Stoops* and others



upon the bond, before they had paid the mortgage. It was held that no more than nominal damages could be recovered.

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v.  
STONE.

In that case, *Stoops* and others were not originally bound to pay the debt secured by the mortgage. That debt was owing by *Schooley*. He was primarily and personally liable to pay it. The mortgage he had given was only a security which his creditors might or might not resort to. If *Stoops* was permitted to recover before the mortgage debt was paid, he might not appropriate the sum recovered to that purpose, and the liability of *Schooley* would yet remain for that debt, to the original creditors. There was no averment nor proof that he was not amply responsible for the debt, without the necessity of a resort to the mortgage security.

In the case in 9 Ind. R., one partner sold out to the other. The purchaser was to pay the debts of the firm and take the stock on hand, &c. Breach, that a certain debt was not paid; that a judgment had been recovered thereon against the firm; and that said purchaser was insolvent. There is no averment that the assets of the firm, which thus passed into the hands of one of the partners, had been diverted from the payment of the debts, or otherwise improperly disposed of. The inference is left, that they were so applied, and were insufficient to meet all the liabilities. The partners were, then, individually liable; and if there had been a recovery against the sureties of the purchasing partner, and a failure, afterwards, by him who sold, to apply the money thus recovered to the discharge of the debts, they would still have remained outstanding against both partners.

In the case at bar, it is averred that, at the time of the death of one of the partners, the assets of the firm were sufficient to pay the debts; but not the individual debts, also, of the deceased partner, incurred before the partnership was formed. For the payment of the latter class of debts, the defendant caused and procured the diversion of all the partnership assets, by his promising and undertaking in consideration thereof, &c., to pay the debts of the



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1859.

McCole  
v.  
Hubble.

firm. There is an averment of the total insolvency of the deceased partner. By the diversion of the partnership assets, the power was taken from the hands of the surviving partner to pay the debts out of the legitimate funds for that purpose. If he had no individual or other means to pay those debts, they would be left hanging over him—his liability would continue—and all this the result of the violation of an affirmative undertaking and promise by the defendant. The estate of the deceased could not be injured by a failure of the survivor to apply any money recovered in this suit to the payment of the debts of the firm; because if there should be a failure to recover, the money thus, by that failure, left in the hands of the defendant, would not go into the fund for the payment of any of the debts of the deceased—it would not increase the fund out of which such debts should be discharged, but would, in effect, throw upon the surviving partner the whole burden of paying those debts, and at the same time take from him the fund that should have been appropriated to that use; and, by the procurement of the defendant, apply it to the use of the estate in another quarter in which the firm, as such, had no interest, nor had the plaintiff, as surviving partner.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*H. C. Newcomb, J. S. Harvey, J. S. Tarkington, and L. M. Campbell*, for the appellant.

*R. L. Hathaway*, for the appellee.

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McCole and Another v. Hubble and Others.

Tuesday,  
June 28.

APPEAL from the *Hamilton* Court of Common Pleas.

*Per Curiam*.—There being no brief filed for the appellants in this case, the errors, if any exist, are deemed to be waived (1).



The judgment is affirmed with 5 per cent. damages and costs. May Term,  
1859.

(1) Twenty-five cases were dismissed on the 93d day of this term, for the same reasons.

HARGUS  
v.  
GOODMAN.

### HARGUS v. GOODMAN and Others.

12 629  
133 160

A recovery in an action for trespass commenced before a justice of the peace, and upon the title of the land being put in issue, removed to a Court having jurisdiction—no judgment having been rendered touching such title further than it might be supposed to enter into the determination of the action of trespass, and no determination of that issue having been necessary to enable the Court to render the judgment—is no bar to an action of ejectment.

APPEAL from the *Daviess* Circuit Court.

*Tuesday,*  
*June 28.*

HANNA, J.—*Hargus* brought suit to set aside a deed of conveyance and obtain a partition of a tract of land. He avers, in substance, that, in 1808, his father purchased of the *United States*, under the laws then in force, a certain tract of land, and paid thereon 121 dollars, 26 cents; that afterwards he paid 109 dollars, 13 cents, but failing to complete the payments thereon, the land reverted to the *United States*; that his father died leaving five heirs, of whom *John Hargus* was the eldest; that afterwards, on the 27th day of *November*, 1828, said *John* procured to be issued to himself and the other heirs of the said *Thomas Hargus* a certificate of the said forfeited land stock No. 1,960, for 229 dollars, 33 cents, the amount which had been paid, &c.; that on the next day, with intent to defraud, &c., he entered, with a part of said certificate, the land now in controversy, in the name of his infant son, *Thomas Hargus, jun.*, and sold and appropriated the balance of said certificate to his own use; that the said land was purchased with the money of the elder *Hargus*, and descended to his five children; that plaintiff had purchased two other



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interests, and was entitled to three-fifths thereof; that *John Hargus* is now dead, but that in his lifetime he represented to plaintiff that he had entered said land in the name of their father, *Thomas Hargus*; that plaintiff, as one of the heirs of said *Thomas*, entered upon and took possession of said land in 1829, with the consent of said *John*, has continued in possession and paid the taxes thereon; that neither said *John*, nor his said son *Thomas*, jun., ever asserted or pretended they held any other title to said land than as heirs of *Thomas*, sen., until about the time said *Thomas*, jun., conveyed the same to the defendant, *Goodman*, to-wit, in 1855; that said *Thomas*, jun., and said *Goodman*, had full notice, &c.

The defendant, *Goodman*, filed an answer of several paragraphs, the fifth of which averred that at the *August* term, 1855, of said Court, an action was pending and determined, wherein said *Goodman* was plaintiff, and said *William Hargus* and one *Abraham Hargus* were defendants, in which said *William* pleaded that the same three-fifths of said land was the property, &c., of said *William*, and that he held the same as a tenant in common with the heirs of *Thomas Hargus*, sen., which was denied by the said *Goodman*, and an issue was thereby formed material in said cause then pending, which was tried and found for *Goodman* and against said *Hargus*, &c., and that the questions of title and tenancy in common in said land were then determined, and are the same in this case to be tried, &c.; wherefore, he is estopped, &c.

The reply to this was, that said action was a mere possessory action against the present plaintiff, for entering upon and cutting timber on said land; and the Court, in that action, merely found the defendant guilty of trespass on the premises, and assessed his damages at four dollars. "And the plaintiff in fact avers that the Court, in that case, did not receive the evidence of the defendant's title in said cause, nor find nor pass upon the legal title of this plaintiff to said lands, now set up in this suit;" wherefore, &c.

To this reply there was a demurrer, assigning two causes—



1. That it does not state facts sufficient, &c.

2. That the plaintiff attempts to traverse facts, which, in said answer, are averred and pleaded as matters of record, without denying the existence of the record.

The demurrer was sustained. Judgment for the defendant. Upon this arises the only question in the case.

In *White v. Mosely*, 5 Pick. 230, an action of trespass was brought for "breaking and entering the plaintiffs' close, called the mill lot, and destroying their mill-dam, standing in and extending across a river, by reason whereof," &c. It was shown on the trial that the plaintiffs, although their dam extended across the stream to the south side, were the owners only to the thread of the stream. The dam was broken south of that line, but the trespassers then went upon the mill lot, for which last act nominal damages were recovered, but the plaintiffs were not permitted to prove the breaking, &c. Afterwards, another action was brought for the breaking and trespass to the dam on the south end, to which, among other things, a plea of former suit and recovery was filed, to which it was replied that the former suit was not for the same cause of action; upon this issue was taken. There was no evidence on that issue other than the former record, and an admission that the act complained of in the former suit, for which damages were given, was the passing over the mill lot by the defendants after they had returned from the south side of the river, where they had destroyed a part of the dam. It was held that the former suit and recovery was no bar to the latter. Same parties, 8 Pick. 356.

In *Swift's Evidence*, p. 17, it is said that "Where the cause and object of both actions are the same, a judgment in the prior bars the subsequent suit. Where the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action, but the verdict is matter of evidence to prove such point." Upon this, in the edition of 1859, of *Phillips on Evidence*, after much comment, in note 261, vol. 2, p. 19, it is said that, "Indeed, the principle will be found to run through nearly all the

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*American* cases, that the judgment of a Court of competent jurisdiction, directly upon a particular point, is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different; and hence, that a judgment may not only be evidence, but conclusive evidence, and still be no bar to the action." 3 Cow. 120.—4 Wend. 284.—1 Conn. R. 1.—5 *id.* 550.—16 Serg. and Rawle, 282.

But whenever "a question is made respecting the identity of the matters litigated in the first suit, parol evidence is admissible to show what transpired on the former trial, and thus explain the record." 2 W. Black. 827.—6 T. R. 607.—8 Pick. 118.—3 *id.* 429.—8 Wend. 9.—4 Cow. 559.—3 *id.* 120.

"If the record show that the first suit was apparently for the same cause of action sought to be litigated in the second, it will be *prima facie* evidence that such cause of action has once passed in *rem judicatum*; and hence, the onus will devolve upon the party against whom the record is used to show the contrary." 2 Johns. 227.—16 *id.* 136.—2 Blackf. 178.—7 Cranch, 565.—3 Barn. and Cress. 239.

"Indeed, this principle of admitting evidence *aliunde*, to explain a record of a former suit, and identify the matters to which it relates, would appear to be indispensable to the efficient administration of justice." *Id.* 22. "Whether any matter has been tried between the same parties, and decided before, is a fact depending in part on parol evidence, and partly on the record." *Id.* 22.—16 Serg. and Rawle, 282.—9 *id.* 81.—2 Stark. Ev. 200.—6 Durnf. and East, 607.—3 Barn. and Cress. 239.—7 Ind. R. 546.—3 *id.* 248.—*The State v. Brutch*, at this term (1).

These principles appear to be subservient to another, and that is, if the point in issue in the subsequent suit, was in issue, either directly or indirectly, and essential to the finding and judgment in the former suit, then that judgment ought to be considered as a bar.

In the case at bar, the former recovery set up in the plea, was in a suit originally instituted before a justice of the peace, where the title to lands could not be tried, but



it is alleged that it was put in issue, and, upon the removal of the cause to a Court having jurisdiction, was there tried and determined. No judgment was rendered relative to such title, any further than it may be supposed to enter into the trial and conclusion of that action of trespass. It is evident that it was not the object of that suit to try the question of title, otherwise the suit would have been brought in a Court having jurisdiction to try the question. But it was put in issue, and we are of opinion that the determination of that issue was not necessary to have enabled the Court to come to the conclusion and render the judgment that was rendered in the case.

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Without stopping, therefore, to determine whether a plea of former recovery, in an action of trespass in the form here laid, is, in any case, a good bar to a subsequent suit, in the nature of an action of ejectment, we are of opinion that, as the original object of the former suit was not to try the title to the land, and as it was not necessary for the Court to decide as to the title, to justify the finding and judgment therein rendered, the defendant had a right, in the present suit, to plead that evidence was not heard upon the issue of title, nor did the Court find upon that issue.

It follows that the demurrer to the reply should have been overruled.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*H. L. Livingston* and *O. H. Smith*, for the appellant.

(1) *Ante*, 381.

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RANSOM and Others v. ROBINSON.

APPEAL from the *Marion* Circuit Court.

*Per Curiam*.—The error assigned in this case is upon

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May Term, 1859. the same point raised in *Ward v. Buell*, 11 Ind. R. 327; and, for the reasons therein given, the judgment must be affirmed.

DORON  
v.  
CROSBY.

The judgment is affirmed with 10 per cent. damages and costs.

*D. Moss* and *J. W. Evans*, for the appellants.

*S. Yandes* and *C. C. Hines*, for the appellee.

MAGILL v. COX.

HEDGE v. GRAHAM.

Tuesday,  
June 28.

APPEALS from the *Parke* Circuit Court, and the *Carroll* Court of Common Pleas.

*Per Curiam*.—In these cases, there are no errors assigned upon the transcripts of the record. 2 R. S. p. 161, § 568. The causes are, therefore, not properly before us.

The appeals are dismissed with costs.

DORON v. CROSBY.

Wednesday,  
June 29.

APPEAL from the *Shelby* Circuit Court.

*Per Curiam*.—This was an action by the appellee against the appellant upon a promissory note in this form:

"\$2,100. On or before the 25th of *December*, 1857, I promise to pay *E. L. Crosby* 2,100 dollars, waiving valuation or appraisement laws—*September* 6, 1855; being the third payment on the east half of the south-east quarter of section 34, in township 12, north of range 6 east; also, the north-east quarter of section 4, in township 11, north of range 6 east; also, the west half of the south-west quarter



of section 34, in township 12, north of range 6 east. *John Doron.*" May Term,  
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This note was filed with the complaint. Defendant below answered by a general traverse. The case was submitted to the Court for trial. Finding for the plaintiff. New trial refused and judgment.

A bill of exceptions shows that the plaintiff offered in evidence the note sued on, which offer was resisted on the ground of variance; but the Court admitted the evidence.

The variance pointed out in the appellant's brief is this: The suit is brought on a note payable to *Elza L. Crosby*, and so, in the complaint, alleged to be payable; but the note given in evidence is payable to "*E. L. Crosby.*" The note was correctly admitted in evidence. *Hauser v. Hays*, 11 Ind. R. 368, is precisely in point, and fully sustains the ruling of the Circuit Court.

The judgment is affirmed with 4 per cent. damages and costs.

*M. M. Ray* and *T. A. McFarland*, for the appellant.

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LONG  
v.  
HAUSER.

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LONG, Auditor, &c. v. HAUSER.

APPEAL from the *Bartholomew* Circuit Court.

Wednesday,  
June 29.

*Per Curiam*.—The question involved in this case has already been determined, viz., that each judge of the Court of Common Pleas, under the constitution and laws, is entitled to receive a salary of 800 dollars per annum. *The State v. Byrne*, 11 Ind. R. 547.

The judgment below, having been in accordance with this rule, must be affirmed.

The judgment is affirmed with costs.

*W. F. Pidgeon*, for the appellant.

*N. T. Hauser*, in person.



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GERRARD v. JOHNSON and Others.

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Where the facts recited in the record do not forbid the conclusion that notice to the heir of an application for an order for the sale of his land could have been given, and jurisdiction of the person thereby obtained, it will be presumed, in a collateral suit, that notice was given.

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APPEAL from the *Franklin* Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant to recover a certain piece of land described in the complaint. The cause was tried by the Court, and there was a finding and judgment for the plaintiffs below, over a motion, interposed by defendant, for a new trial. The finding and judgment were right, unless the title set up by the defendant was valid. The plaintiffs claimed, as heirs of one *Samuel Johnson*, deceased, who died in 1840; and the defendant claimed under a sale made by the administratrix of *Samuel Johnson*. The validity of the sale is the only question involved in the case.

To sustain his title, the defendant gave in evidence the record of the proceedings in the *Decatur* Probate Court, by which it appears that at the *February* term of said Court, 1840, *Elizabeth Johnson*, as administratrix of *Samuel Johnson*, filed her petition in that Court, for an order for the sale of the land in controversy, making the appellees defendants thereto, who were alleged to have been minors. Thereupon, on motion, the Court appointed a guardian *ad litem* for them, and the guardian waived the service of notice in the case and entered his appearance, and showing no cause why the land should not be sold, a sale thereof was ordered. These proceedings all seem to have taken place on the same day. Afterwards, at the *November* term for the same year, the administratrix filed her report of the sale, and the sale was confirmed, and a deed ordered to be made.

The defendant also offered in evidence the deed made in pursuance of the sale. It was agreed that at the time of filing and hearing the petition for the sale of the land, the appellees were residents of *Decatur* county.



The question arises whether, on the above facts, the order of sale is a nullity, or whether it is to be deemed valid when attacked collaterally.

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v.  
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It is settled that a sale ordered and confirmed without notice to the heir, or his appearance, is void. *Babbitt v. Doe*, 4 Ind. R. 355.—*Doe v. Anderson*, 5 *id.* 33.—*Doe v. Bowen*, 8 *id.* 197.

The principle is, that in order to give validity to the proceedings of Courts, they must have jurisdiction of the parties, and of the subject-matter. No one should be bound by proceedings which he has had no opportunity of defending. Jurisdiction of the parties can only be acquired by summons, notice, or by the appearance of the party in person or by attorney. If the Court has acquired no jurisdiction of the party, its proceedings cannot affect the rights of that party.

The law under which the proceedings in the Probate Court were instituted, required a summons to be served on the appellees (as they were residents of the state) thirty days before the hearing of the petition. R. S. 1838, p. 182, § 29. This, it is clear, was not done, as the petition was filed and the sale ordered on the same day.

Can it be presumed, on what is stated in the record offered in evidence, that the appellees were present in Court, whereby a formal notice to them might be deemed to be waived or rendered unnecessary?

It will be observed that it does not affirmatively appear on whose motion the guardian *ad litem* was appointed. In the case of *Thompson v. Doe*, 8 Blackf. 336, as afterwards explained in *Horner v. Doe*, 1 Ind. R. 30, and again in *Doe v. Bowen*, 8 Ind. R. 197, it was held that in such case it would be presumed that the defendants to the petition were personally present in Court; which would be sufficient to give jurisdiction. A majority of the Court are of opinion that, in accordance with the cases above cited, it should be presumed, the record not showing anything to the contrary, that the defendants to the petition were personally present in Court, and that the Court had acquired



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jurisdiction over them, so as to render the proceedings valid when attacked collaterally, as in the present case.

In the case of *Borden v. The State*, 6 Eng. (Ark. R.) 519, where this subject underwent a very full examination, and where it was held by a majority of the Court that the judgment of the superior Courts were not void, but only voidable, in the absence of notice to the defendant, Mr. Justice WALKER, who dissents from the opinion of a majority of the Court, says: "I do not intend to be understood as assuming that every fact necessary to confer jurisdiction on a Court of superior jurisdiction, must affirmatively appear of record. In this, I think the former decisions have gone too far. Every reasonable presumption in favor of the rightful exercise of jurisdiction, ought to be indulged."

In that case, a Probate Court was held to be a superior Court, within the meaning of the rule established by a majority of the Court, and from this position, Judge WALKER does not dissent.

The case is cited, not for the purpose of adopting the doctrine held by a majority of the Court, but to show that the presumption indulged in, in the case at bar, is not without authority beyond the cases in our own Courts.

It follows that the proceedings of the Probate Court were not void, and that the title thus acquired is valid; hence, the motion for a new trial should have been granted.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for a new trial.

*J. Ryman*, for the appellant.

*J. Gavin* and *O. B. Hord*, for the appellees.



JONES v. MYERS and Others.

May Term,  
1859.LOGAN  
v.  
WALTON.APPEAL from the *Wabash* Circuit Court.

*Per Curiam*.—This was a suit in chancery commenced in December, 1848, and final decree rendered in the Court below in October, 1851. Having examined the case, we are satisfied that its decision turns upon the weight of evidence, which, in our opinion, fully sustains the decree of the Circuit Court.

The decree is affirmed with 3 per cent. damages and costs.

*J. U. Pettit*, for the appellant.

*H. P. Biddle* and *B. W. Peters*, for the appellees.

Wednesday,  
June 29.

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 LOGAN v. WALTON.
APPEAL from the *Hendricks* Circuit Court.Wednesday,  
June 29.

*Per Curiam*.—*Mary A. Logan*, the plaintiff in this case, claimed one-third in fee of a certain town lot described in the complaint. The facts are, that in 1839, *Abram Logan*, the husband of the plaintiff, was seized in fee of the lot in question, and afterwards, in the same year, it was levied upon and sold by virtue of an execution issued from the *Hendricks* Circuit Court against the said *Abram*. The defendant claims under the purchaser at said sale, and is in possession. *Abram Logan* died in September, 1856.

The Court below decided against the plaintiff's claim to a fee simple interest in the lot; but her right to a dower estate was not contested, and dower was allowed her. From this decision she appeals.

That in such case the plaintiff is not entitled to a fee in one-third of the property, has already been determined by this Court. *Strong v. Clem*, at the present term (1). The case cited determines, also, that in such case the widow is



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not entitled to a dower interest; but she of course cannot complain that the Court allowed her a dower interest, and the other party does not complain, wherefore the judgment must be affirmed.

The judgment is affirmed with costs.

*C. C. Nave* and *J. Witherow*, for the appellant.

(1) *Ante*, 37.

DEARMOND and Others v. Bohn and Others.

Wednesday,  
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APPEAL from the *Decatur* Court of Common Pleas.

*Per Curiam*.—Suit upon a promissory note.

Answer—1. Payment. 2. That the note was given to secure the payment of the consideration for a tract of land purchased, &c.; that plaintiffs pretended to be seized in fee, when in fact they had no title. Wherefore, &c.

The reply was a denial.

The defendant moved the Court to certify the case to the Circuit Court, which motion was overruled, and upon that ruling the only question in the case is made in the brief of counsel.

This question has already been decided at the present term, in the case of *Harvey v. Dakin* (1); and for the reasons therein given the judgment in this case is affirmed.

The judgment is affirmed with 10 per cent. damages and costs.

*J. Gavin* and *O. B. Hord*, for the appellants.

*J. S. Scobey* and *W. Cumback*, for the appellee.

(1) *Ante*, 481.



## REED v. THE STATE.

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v.  
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12	641
137	561
12	641
148	360

12	641
158	615

12	641
156	628

12	641
157	225
12	641
162	204

An act of 1859 is entitled "An act to amend section eleven of an act entitled 'An act to establish Courts of Common Pleas, and defining the jurisdiction and duties of, and providing compensation for, the judges thereof,' approved May 14, 1852—so as to extend the jurisdiction of said Court in certain cases." *Held*, that the latter part of the title embraces § 2 of the act, extending or increasing the jurisdiction of the Court in criminal cases.

It is not necessary, under the constitution, that all matters properly connected with the principal subject-matter of a statute shall be expressed in its title.

Section 1 of the act above mentioned sets out and amends § 11 of the act of 1852, touching the civil jurisdiction of the Common Pleas, and § 2, extending the jurisdiction of the Court in criminal cases, is added. *Held*, that the subject-matter of the act of 1852 was the jurisdiction of the Court, and that of the act of 1859, was the increase of that jurisdiction; and hence, § 2 of the latter act is a part of the amendment of § 11 of the former act.

The mode of initiating and conducting prosecutions for criminal offenses must be uniform in the same Court, but it may be different in different Courts. Thus, in the Circuit Court, prosecutions for felonies are initiated by indictment; but under the act of 1859, they may be commenced in the Common Pleas by affidavit and information.

APPEAL from the *Marion* Court of Common Pleas. *Wednesday,*

HANNA, J.—*Reed* was convicted of grand larceny. The only question in the case is, whether the Common Pleas Court had jurisdiction.

It is conceded by the counsel for the defendant, that the legislature possesses the power to confer jurisdiction over such offenses. The question is, has it been exercised in a constitutional manner?

The act purporting to confer the jurisdiction, was passed at the last session of the General Assembly. Acts 1859, p. 94.

It is insisted that the title of the act is not broad, comprehensive, and at the same time specific, enough, to properly embrace within it the provision in question, keeping in view § 19 of art. 4 of the constitution, namely, "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title," &c.

The title is as follows: "An act to amend section eleven of an act entitled 'An act to establish Courts of Common



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Pleas, and defining the jurisdiction and duties of, and providing compensation for the judges thereof,' approved May 14, 1852—so as to extend the jurisdiction of said Court in certain cases."

Section 11 of the original act, to which the first part of this title refers, is the one conferring and defining the jurisdiction of that Court in civil cases. The first section of this amendatory act is relative to jurisdiction in civil cases, and it is argued that the whole subject properly embraced within the title, was, by that section, exhausted; that the second section, upon the subject of the jurisdiction of that Court over felonies, was not, therefore, legitimately placed in the bill, under that title.

We cannot concur in this view. We are of opinion that the latter part of the title, to-wit, "so as to extend the jurisdiction of said Court in certain cases," may, and does, embrace within its legitimate meaning, the extension or increase of the jurisdiction of the Court in criminal cases. If this is to be regarded as an original enactment, then, even if the subject is not embraced in the title, as a primary and substantive subject of the then action of the legislative body, it falls clearly within "matters properly connected therewith"—that is, with the subject which must be embraced in the title, namely, the jurisdiction of the Court. In other words, this fundamental provision does not require that all the "matters properly connected" with the principal subject-matter of such bill, shall be expressed in the title, but only that principal subject. Here the principal subject of the act in question, is in relation to the increase of the jurisdiction of the Court. *Gabbert v. The Jeffersonville Railroad Co.*, 11 Ind. R. 365.

It has been suggested, in consultation, that, in amendatory enactments, there can be but one legitimate purpose in view, under § 21 of the same art. of the constitution, and the law relative to amendments. Section 21 is, that "No act shall ever be revised or amended by mere reference to its title; but the act revised, or section amended, shall be set forth and published at full length."

In the case at bar, § 11 of the act of 1852 is the only



one set forth at full length, or, indeed, at all, in the subsequent statute. It is not, therefore, an attempt to revise the whole act of 1852. That section, as before stated, treats of the jurisdiction of the Court in civil cases only. Section 14 treats of, and confers jurisdiction in, all offenses which do not amount to felony.

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The purpose which, it has been suggested, was in view by the adoption of the statute, under the title given it, could not have been other than to perfect the section named, upon the particular subject therein treated of, to-wit, civil jurisdiction in certain enumerated cases; that the section of the constitution (§ 19) which permits matters properly connected with the main subject of the enactment, to be embraced in the same bill with the main subject, can have reference only to enactments of an original, primary character, and not to such as profess to be, and are, of a mere amendatory character; that in the latter class of enactments there can be but one object in view, one subject embraced, and that is, in regard to the particular clause of the original act to which the title of the amendatory one refers; that when the amendatory enactment has fully treated of that particular clause, no other matter can be included in its provisions, as being properly connected therewith, even though it might be so included, if it was a bill of the original character above indicated.

There is much force in these suggestions, because of the great difficulty in tracing a precise line beyond which it would be an excess of power to go, and within which the legislative power may legally act. Although it is a salutary rule to construe a fundamental law strictly, yet if, in applying the usual rules of construction, doubt should still exist as to whether the enactment is in consonance with the fundamental law, we know of no safer guide than to let the coördinate branches of the government have the benefit of that doubt, and only declare an act unconstitutional by judicial decision, when it is manifestly so. Care should be taken that this construction, given by each of the departments of the government, within its legitimate sphere, to any particular clause of the constitution, should



May Term, 1859. **REED** v. **THE STATE.** have its due weight. The consideration that one department should give to the views of a coördinate department, in placing a construction upon a fundamental law, depends upon the particular subject of the clause under consideration in each particular case. So the weight that the judicial branch of the government should give to the opinion, as expressed by the acts of the legislative branch, should depend, somewhat, upon whether the clause under consideration was, or was not, a restriction upon that branch, in the exercise of its powers.

Keeping these things in view, we again recur to the suggestion upon the 21st section named, and inquire whether the additional jurisdiction extended to the Common Pleas Court by the act under consideration, can properly be included within the title, and be conferred under it.

To arrive at a correct solution of this inquiry, it is, perhaps, necessary to advert, for a moment, to the parliamentary law, upon the subject of amendments, as applied in legislation.

It is said in § 35 of Jefferson's Manual, that "Amendments may be made so as totally to alter the nature of the proposition; and it is a way of getting rid of a proposition, by making it bear a sense different from what was intended by the movers, so that they vote against it themselves. A new bill may be ingrafted, by way of amendment, on the words, 'Be it enacted,' &c. See, also, 2 Hats. 110; 4 *id.* 84, 87. We have verified these references, and find they sustain the text of *Jefferson*.

In the convention which framed the constitution, it was stated by a leading member, upon the first day of the session, before the adoption of any rules by that body for its government, that "the *lex parlamentaria* was as much the law to govern every deliberative body in this country, until such body had adopted rules for its own government, as the common law was applicable to the government of proceedings of the Courts of law." Deb. vol. 1, p. 6. This proposition, so advanced, was acquiesced in by that body; and, on the same day, a resolution was adopted, "that a committee be appointed to report rules of order for the govern-



ment of the proceedings of this convention" (*Id.* p. 7); which report and rules we have carefully examined (pp. 34, 38, 57, 58, of the Journal); and although the time and manner of offering, and the mode of disposing of, amendments, is therein provided for, yet there is not any indication of what an amendment is, or what may be contained in such a proposition.

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The journal of that convention shows that, in many instances, propositions by the way, and under the name, of amendments, were introduced, entertained, and acted upon, by that body, which were not directly relevant and germane to the subject-matter of the original proposition. Examples may be seen in almost every day's proceedings, of motions by way of amendment acted upon, to strike out, sometimes the whole, at other times a part, of a section, and which, although it might be upon the same general subject, yet would evidently lead to other results and conclusions.

It has been further suggested that although the authority in *Jefferson* was, and is, the parliamentary law, in *England*, and, at the time it was written, in this country, yet that there has grown up a different rule here; that an amendment cannot be different from the original proposition, and must be to perfect, alter, change, or modify that proposition. So far as there has been any change or departure from the rule laid down by *Jefferson*, it has grown out of the national or state legislative bodies in this country, having adopted and acted upon arbitrary rules upon that point. Whether, as avowed by a member, and silently conceded by the convention, the *lex parliamentaria* was in force here at the time of the sittings of that body, as contradistinguished from certain usages which had grown up in this country, under local rules upon the subject, we need not pause to inquire. The result arrived at, construing the term amendment by the one or the other of these rules, is, as to this enactment, the same.

The usage referred to has grown up under the following rule adopted by the House of Representatives of the *United States*, in 1822, and somewhat similar ones which had



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existed from the time of the congress of the confederation, to-wit, "No motion or proposition, on a subject different from that under consideration, shall be admitted under color of amendment."

Similar rules are adopted and acted upon in many of the states.

Now, as to the application of the rule. In the 31st Congress, 1st Sess., Journ. of the House, p. 784, a bill was under consideration granting the right of way, and making a grant of lands to the state of *Michigan*, and it was held admissible to amend it by adding thereto a provision for a similar grant to other states for sundry railroads therein. So, upon a bill proposing to the state of *Texas* a definition of her boundaries, and the relinquishment by her of certain territory, &c., it was moved to amend by adding two new sections, providing territorial governments for *New Mexico* and *Utah*. Objection, that the amendment was not germane, held admissible by the speaker and sustained by the House.

So, in a late work, it is said that "A proposition may be amended, in parliamentary phraseology, not only by an alteration which carries out and effects the purpose of the mover, but also by one which entirely destroys that purpose, or which even makes the proposition express a sense the very reverse of that intended by the mover; and, in like manner, a motion, which proposes one kind of proceeding, may be turned into a motion for another of a wholly different kind by means of an amendment." *Law and Pract. of Leg. Assemblies in the United States*, by Cushing, ed. 1850, p. 516.

It is again objected that the division of the amendatory act into two paragraphs or sections, is evidence that two subject-matters are included in it; that as the title professes to amend but one section of the old law, that amendment must be contained, and be presumed to be so contained, in the section of the amendatory enactment within which the old law to be amended is set forth.

Upon the question of numbering and paragraphing, the authority last referred to is as follows: "The numbers pre-



fixed to the several sections, paragraphs, or resolutions, which constitute a proposition, are merely marginal indications, and no part of the text of the proposition itself; and, if necessary, they may be altered or regulated by the clerk, without any vote or order of the House." *Id.* p. 533. See, also, Journ. of the House of Rep. of the United States, 29th Congress, 1st Sess., p. 1029; Jeff. Man., p. 79.

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We think, therefore, that, as before stated, the subject of the eleventh section of the old statute was in relation to the jurisdiction of the Court; and as the subject of the statute under consideration was an increase of the jurisdiction of that Court, the whole of said act upon that subject was properly included under the title set forth; and that the whole of the enactment, in that respect, is an amendment of that section, expressed, it is true, in a very inartificial, bungling, and awkward form, but conforming substantially to the constitutional requirement.

The principal question in this case, arises under the 22d and 23d sections of the 4th art. of the constitution, which, so far as applicable, is as follows:

"Sec. 22. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: \* \* \* \* Regulating the practice in Courts of justice. \* \* \* \*"

"Sec. 23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state."

By the act organizing Circuit Courts (2 R. S. p. 5), and that in regard to the rules, practice, &c., in criminal cases (*id.* 361), and also an act to limit the number of grand jurors, &c., and defining their jurisdiction, &c. (*id.* 387), exclusive jurisdiction over felonies, was vested in the grand jury and Circuit Court. *Spencer v. The State*, 5 Ind. R. 41.

The mode of proceeding in prosecutions for felony, is pointed out by the statutes above referred to. The grand jury is selected and organized in a manner, if the statute is observed, which shows that much caution and circumspection was thought necessary upon that point. That



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body consists of twelve members; any nine are competent to find a bill; to make such a legal presentment of a charge of crime against an individual as will authorize the Court to which the bill is returned, namely, the Circuit Court, to place him upon his trial. This is, in that respect, a modification of the grand jury system as it existed at the time of the adoption of the new constitution. Previous to that time, at least twelve men on the grand jury, had to agree to the presentment of a bill, and the jury might consist of not less than twelve nor more than eighteen. No man could be "put to answer any criminal charge, but by presentment, indictment, or impeachment." Const. 1816, art. 1, § 12. Notwithstanding this provision, it is a part of the history of the state, and of the judicial proceedings therein, that, at the time our new constitution was adopted, the practice in our Courts in various localities of the state, in prosecutions for crimes and misdemeanors, had become as different as the views of the many communities into which citizens were divided, in consequence of their emigration from the several parts of this extended confederacy, might suggest was best for the welfare of those who inhabited each locality. It is well known, that in many of the circuits of the state, the judge thereof was at a loss, in each county, as to the local laws and regulations upon the subject of the practice of the law in such county. He would often be stopped in the midst of his charge to the grand jury, when commenting upon some offense against the law, and the rules of evidence, &c., that should be observed in their investigations thereof, by a suggestion that, by some local law, the grand jury had not jurisdiction over that offense. In another county he would meet with statutes, local to that county, by which certain days were set apart for forming and perfecting the pleadings, and others for the trial of causes of a civil nature.

It was to remedy these, and various evils of a kindred character, that the clause and sections under consideration were adopted.

It was not made a cause of complaint, under the clause of the constitution of 1816, that many offenders against



the statutes, guilty of misdemeanors, were, by such local and special laws, put upon their trial without indictment, in the Courts inferior to the Circuit Court. The great complaint and crying evil, was, that there was no uniformity, even in adjoining counties, upon the subject of the jurisdiction of the same Court over similar offenses, or in the mode of proceeding in civil cases, in the Courts of the same name, and really organized under the same law.

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The constitution expressly provides that "the General Assembly may modify or abolish the grand jury system." § 17, art. 7. As we have seen, some modification of that system has been made; and it is not insisted but that it might be, by the legislature, entirely abolished.

But it is urged that, whilst that mode of presenting a man for trial remains the only mode of arriving at such a result in one Court of the state, no mode, essentially differing therefrom, can be established in another Court, having like jurisdiction of the same offenses, and both modes of procedure stand; that one or the other must fall; that the law must be uniform throughout the state.

This argument, carried to its legitimate conclusion, would require the same proceedings in all Courts having concurrent jurisdiction. For instance, there are some offenses treated as misdemeanors, by the statutes defining the offense and prescribing the punishment; and yet the Circuit, the Common Pleas, justices' and city Courts have concurrent jurisdiction conferred, to hear, try, and determine, &c. Under the practice which has obtained heretofore, one offender would be placed upon his trial in the first-named Court upon an indictment preferred by a grand jury; in the second, upon an information preferred by the district attorney, founded upon an affidavit; in the third, upon an affidavit alone, &c. So of the offense in the case at bar, if the defendant had been prosecuted in the Circuit Court therefor, twelve men would have passed upon the charge against him before he could have been placed upon his trial. Nine men would have agreed that he should be so placed. In the Common Pleas, an affidavit was filed by one person, and an information filed thereon



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by another, as it was his official duty to do, the same as it is the official duty of a prosecuting attorney to prepare an indictment when directed to do so by the grand jury. It would appear from the statute (2 R. S. p. 364), that, upon a sufficient affidavit being filed, the duty of the district attorney is imperative—he must file an information; nor does there appear to be any discretion, whilst the case remains upon the docket, in the Court. The defendant must be placed upon his trial. Whether a man shall be placed upon his trial upon a charge involving his liberty, and, to a great extent, his character, even if acquitted, depends upon the will of his, oftentimes malicious, accuser. It is true, that if those who know of the commission of an offense, do not voluntarily come forward and file an affidavit, then it is provided (2 R. S. p. 385) that they may be brought before the Court, and sworn and examined touching such offense, and if a reasonable presumption of guilt appears, the Court shall order so much of the testimony as amounts to a charge, &c., to be reduced to writing, and subscribed, &c. Here appears to be some judicial discretion lodged in the Court, to determine whether the case presented is such as ought to be prosecuted. We suppose that, in any case, the Court may direct, and the attorney may enter a *nolle prosequi*, after the institution of the proceedings. But the difficulty is, that, under one system, there is a tribunal, the grand jury, standing between the accuser and the accused—between the offender and the offended law—whose consent must be legally obtained before the humblest man can be compelled to appear for trial. By the adoption of the other system, any man, however poor, or however innocent, may be placed upon his trial at the instigation of a single individual. In other words, all barriers between the accused and his triers are broken down. He is accused and placed upon his trial without the intervention of a grand jury, or the consent of an intermediate advisory tribunal, such as might have been erected, and even without the exercise of any discretionary power, by the officers representing the state. With the question of whether this was wise



or unwise legislation—whether it is calculated to protect the innocent, or more speedily and certainly bring to punishment the guilty—we have nothing to do; it is only for us to decide whether, in the two modes of proceeding, there is that uniformity required by the fundamental law of the land. We have no hesitation in saying that the two modes of prosecuting cannot be initiated and carried forward in the same Court. The practice must, at least, be uniform in the same Court in each county of the state. For instance, if a statute should be passed that either or both of the modes might be adopted in the Circuit Court, then the mode resorted to might very greatly depend upon the will of the officers of the Court. In one circuit they might choose to institute proceedings by indictment, and in an adjoining one by information. There would, then, be but little uniformity in the practice in the same Court all over the state.

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But still, the question remains, is it within the province of the legislature to prescribe the one mode of proceeding in the Circuit Court, and the other in the Common Pleas, and a slightly different one before a justice, for the purpose of charging and placing upon trial a man guilty of an offense? Does this meet the requirements of the constitution, that the laws shall be general and of uniform operation throughout the state, upon the subject of regulating the practice in Courts of justice?

The judiciary should set out, in the examination of every statute, with the presumption that the acts of the two coördinate departments of the government have been within the powers conferred upon them. *Waldo v. Wallace*, at this term (1). Nevertheless, as, under our form of government, the legislature is the creature of the constitution, owes its existence to that instrument, derives its powers from it; that is, the voice of the people in their sovereign capacity, fixing the limits of the legislative power; and as the same instrument makes the highest judicial tribunal thereby created the ultimate resort to determine as to whether a statute is constitutional or not, that tribunal should not hesitate to so declare when a



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proper case is presented and made out. In arriving at a conclusion upon such a question, the state of facts and circumstances existing at the time of the adoption of the fundamental law, and that caused its adoption, if such existed, should be examined; as well as what was done under the law immediately after its adoption. We have already referred to the facts falling under the first branch of this proposition; as to those falling under the second branch, we may refer to the fact that, by our statute books, it appears that, at the first session of our legislature, after the adoption of the constitution, and at every session since, now near eight years, there have been acts passed by that department of the government, and received the sanction of the executive department, that directly prescribed or indirectly involved this diversity of modes of practice, in criminal and civil cases, in the different Courts of the state. These laws have received the indirect sanction of the judicial department by the judicial administration of those laws by the several Courts of the state, although the question may not have been directly decided in any given case.

Indeed, soon after the adoption of the constitution, a statute very similar to the one under consideration, received the direct sanction of the legislative and executive branches of the government (2 R. S. p. 19), and the indirect approval of this Court. *Lindville v. The State*, 3 Ind. R. 580. It is true, that the law under which *Lindville* was prosecuted, was afterwards decided to be inoperative. *Spencer v. The State*, 5 Ind. R. 41. Yet it was not because it was unconstitutional, but for the reason that it was repealed by an act passed at the same session, but of a later date, and which was not in force at the time of the decision in the case in 3 Ind. R. The act under which *Lindville* was prosecuted, and which was very similar to the one of last winter, was put in force by an emergency clause. The one which repealed it by implication, was left to be put in force when regularly circulated. So that decision may be regarded as an indirect judicial construction of the provisions of the constitution now being con-



sidered. It is not direct, because the question was not made in that form; but one of the objections was, that "the proceeding by information is one unknown to and unauthorized by law." Under this objection, the reasons urged were other than that now being considered; yet we should regard the decision, to some extent, as an exposition of the views of the judiciary. The same constitutional clauses we are now considering were then in force, and although the question now urged was not then presented as a distinct proposition, we must presume that, if the law was so palpable a violation of those constitutional provisions as then understood, some notice would have been taken of the point. The inference would be that the infraction of the constitution was wholly overlooked, which is not probable, or else that the construction then given to that instrument, upon the point involved, was not the same as that now sought to be placed upon it by the defendant in the case at bar.

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But, to take a more comprehensive view of the question, we do not well perceive how the advocates of a rigid application of the clauses upon the subject of an uniformity of laws throughout the state, to the modes of practice in different Courts, can stop at its application to cases alone where concurrent jurisdiction is given. If the view we have taken is incorrect, and laws "regulating the practice in Courts of justice" must be general and uniform as to the mode and manner of proceeding in the several Courts where there is concurrent jurisdiction, a like mode of reasoning would require that the same rule should be applied in all other cases.

In other words, felonies could not be prosecuted in the Circuit Court by one mode of procedure, and misdemeanors in the Common Pleas by another mode. This would involve the somewhat absurd conclusion, that the whole contemporary practice of the several departments of the government, in that respect, was wrong, and has continued wrong up to this time; and that the sense in which those portions of that instrument was then understood by persons acting in those departments, was an improper one.



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PARKER  
v.  
HASTINGS.

We are not prepared to so decide now, whatever we might have decided, if this had been, immediately upon the adoption of the constitution, presented to us, as a new and untried question, without the light of all this contemporaneous construction to steer by.

We are, therefore, of opinion that the judgment of the Common Pleas Court should be affirmed.

DAVISON, J., dissented.

*Per Curiam*.—The judgment is affirmed with costs.

*H. W. Ellsworth* and *S. A. Colley*, for the appellant.

*J. E. McDonald* and *A. L. Roache*, for the state.

(1) *Ante*, 569.

### PARKER and Others v. HASTINGS.

A brief must contain an abbreviated statement of the pleadings, proofs, affidavits, &c., with a concise narrative of the facts of the case, and a summary of the points involved, with a citation of authorities, if any are relied upon, and an argument upon all these, characterized by perspicuity and conciseness.

Wednesday,  
June 29.

APPEAL from the *Ripley* Circuit Court.

PERKINS, J.—The assignment of errors in this case is as follows:

“State of *Indiana*, set. In the Supreme Court.

“*Samuel Parker, Freeman Munger, Stephen Merrill, and Joseph Zaner* v. *David Hastings*.

“Appeal from the *Ripley* Circuit Court.

“Come the said appellants by *Jonathan W. Gordon*, their attorney, and say there is manifest error appearing in the record and proceedings of the above entitled cause, in this, to-wit:

“1. The jury found contrary to law.

“2. The jury found contrary to evidence.



"3. The Court below modified charges asked by the defendants, which modifications were contrary to law. May Term,  
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"4. The Court misinstructed the jury. PARKER

"5. The Court, contrary to law, refused to charge the jury as asked by defendants below. V.  
HASTINGS.

"6. The Court permitted the plaintiff below to give improper evidence to the jury.

"7. The Court excluded evidence offered by the defendants, proper to have been given.

"8. The Court refused to grant a new trial, and rendered judgment upon the erroneous verdict of the jury.

"9. There are other manifest errors in said record.

"J. W. Gordon,

"Daniel Kelso,

"Attorneys for appellant."

#### APPELLANT'S BRIEF.

"In the Supreme Court. *November term, 1854.*

"*James Parker et al. v. David Hastings.*

"Appeal from the *Ripley* Circuit Court.

"This was an action of trespass *quare clausum fregit*, brought by *Hastings* against *Parker* and others, for entering upon his lands and removing a dwelling house. Pleas, general issue, and justification under a license. Replication *de injuria*. Trial by jury, and verdict for plaintiff below for 75 dollars.

"There was a motion for a new trial overruled, and judgment on the verdict.

"1. The verdict of the jury was contrary to evidence. 2. The charge of the Court was not the law. 3. The Court qualified the charges asked for by defendants, which qualifications were contrary to law. 4. The Court refused to give charges asked for by the defendants, which should have been given. 5. The Court allowed inadmissible evidence to go to the jury. 6. The Court excluded admissible evidence from the jury. 7. The Court rendered judgment for the plaintiff, on the verdict of the jury, when, according to law, they should have set aside the verdict,



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and granted a new trial. All of which is respectfully submitted.

*J. W. Gordon*, for appellant."

Rule 26 of the Supreme Court, reads thus: "The pages, and lines upon the pages, of transcripts, must be numbered before the cause is submitted, and the transcript must be referred to in the briefs, by page and line." Ind. Dig., p. 722.

This paper, purporting to be a brief, does not, even supposing it to be such, conform to the rule; though the Court would not, probably, be disposed to, in all cases, avail itself of the defect of want of reference to the lines of the transcript.

But is the paper filed in this case, a brief?

What is a brief? In the *English* practice it is "an abbreviated statement of the pleadings, proofs, and affidavits at law, or of the bill, answer, and other proceedings in equity, with a concise narrative of the facts of the plaintiff's case, or the defendant's defense, for the instruction of counsel at the trial or hearing." Whart. Law Dict. h. t.

In *America*, at least in *Indiana*, a brief, in addition to the statement of the case above mentioned, should contain a summary of the points or questions involved, with a citation of authorities, if authorities are relied on, and an argument based upon both, which should be characterized by perspicuity and conciseness; though, says *Bouvier*, "when the argument is pertinent and weighty, it cannot be too extended. *Ibid*."

It is manifest, from these definitions, that the paper filed by counsel is not a brief. A mere copy of a part of the assignment of errors can scarcely be dignified with the name.

Such being the fact, the cause is before us without a brief by the appellant. But by rule 28 of the Supreme Court (Ind. Dig., *supra*), points not made in the brief of counsel are considered as waived; and where no brief is filed, no points are made, and all are waived. Such being the case, this Court has nothing to do but to affirm the judgment below, or dismiss the appeal, either of which courses it is in its power to take.



*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

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*J. W. Gordon and D. Kelso*, for the appellants.

Wood  
v.  
Wilson.

### WOOD v. WILSON and Another.

*A.* built a mill and dam, and proceeded to obtain a writ of *ad quod damnum*.

The jury found that the mill was of public utility, and that no injury would result from its erection, except to *B.*, whose lands were overflowed and injured 50 dollars. *B.* appeared in the Circuit Court and filed nine pleas. The last five were—5th. That the damage to the lands was more than 50 dollars, to-wit, 500 dollars. 6th. That he (*B.*) was the owner of a mill, &c., above that of *A.*, which was greatly injured, &c. 7th. That he was the owner of a certain spring, &c., which was greatly injured. 8th. That a mill privilege owned by *B.*, on his land above said mill, was greatly injured over and above said assessment, to-wit, 500 dollars. 9th. That a flume, bulkhead, and race, owned by *B.*, above said mill, was rendered valueless, to his injury 50 dollars, over the amount assessed, &c. Issue upon the 6th, 7th, and 8th pleas, and as to the 9th, reply that the race, bulkhead, &c., were, by said *B.*, erected in bad faith, for the purpose of injuring, &c. Rejoinder by *B.* taking issue. Trial by jury; failure to agree. Several terms afterwards, *B.* moved to dismiss the proceeding. The record states that the Court, "after hearing the proofs and allegations of said defendant in favor of said motion, and the proofs and allegations of the parties, both in support of and against said motion, issues, and traverses, made, joined, and tendered, as aforesaid, except as to the amount of damage assessed by the jury of inquest, on which subject evidence was introduced by both parties, but was not considered by the Court in deciding said motion, the Court found for the plaintiffs, and overruled said motion." Without further trial, the inquest was confirmed. Objections by *B.*, that he had no notice of the time of holding the inquest; that the form of the oath of the jury was wrong; and that the confirmation of the inquest was erroneous.

*Held*, 1. That as *B.* appeared at the first term after the return and filing of the inquest, and did not make either of the first two objections, it is too late on appeal.

2. That the issues of fact upon the question of damages, should have been disposed of before the Court should have made an order of confirmation.

### APPEAL from the Porter Circuit Court.

Wednesday,  
June 29.

HANNA, J.—*Wilson and Sanders* built a mill and dam, and afterwards proceeded, under the statute of 1843, to obtain a writ of *ad quod damnum*. The writ was issued,



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v.  
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and an inquest held by the sheriff, and a jury by him impaneled under it, and returned to the Circuit Court.

The jury found that the mill was of public utility; that no injury would result by its erection, except to *John Wood*; whose lands, by being overflowed, were injured 50 dollars.

*Wood* appeared in the Circuit Court, and filed nine pleas, which, so far as applicable to the points made herein, are, in substance, as follows:

5. That the damage to the lands of said *Wood*, &c., was much more than 50 dollars, to-wit, 500 dollars.

6. That he was the owner of a mill, &c., above that of *Wilson*, &c., which was greatly injured, &c., by the back water, &c.

7. That he was the owner of a certain spring, &c., which was greatly injured, &c.

8. That a mill privilege owned by *Wood*, on his land above said mill, was greatly injured over and above said assessment, to-wit, 500 dollars.

9. That a flume, bulkhead, and race, owned by *Wood*, above said mill, was rendered valueless, to his injury 50 dollars over the amount assessed, &c.

The said applicants took issue upon the said 6th, 7th, and 8th pleas; and as to the 9th plea, replied that the race, bulkhead, &c., of said *Wood*, were by him erected in bad faith, for the purpose of injuring and annoying, &c. To this, *Wood* filed a rejoinder, taking issue.

A trial by jury was thereupon had, but, in consequence of a failure to agree, no verdict was rendered.

Several terms afterwards, the parties appeared, and *Wood* "moved the Court to dismiss the proceedings in the case." The record then states, that the Court, after "hearing the proofs and allegations of said defendant in favor of said motion, and the proofs and allegations of said parties, both in support of and against said motion, issues and traverses made, joined, and tendered as aforesaid, except as to the amount of damage assessed by the jury of inquest, on which subject evidence was introduced by both parties, but was not considered by the Court in deciding said motion, the Court found for plaintiffs, and overruled said motion."



The Court, without further trial, then confirmed the inquest, &c.

It is now objected that *Wood* had no notice of the time of the holding of said inquest; but as he appeared at the first term of the Court, after the return and filing thereof, and did not raise that objection in that Court, we think it is now too late to do so for the first time. The same may be said as to the objection now urged to the form of oath of the jury of inquest.

It is next objected that the confirmation of the inquest was erroneous. We are of opinion that this objection is well taken.

The statute (§ 110, R. S. 1843, p. 946), provides that, "Any person interested in or affected by any inquest provided for in this article, may appear and traverse any material fact therein stated, or he may plead or show any valid matter in bar of the right of the applicant to have the benefit of such writ; and issues of law and of fact may be made up and tried, and the Court may adjudge costs therein, as in actions at common law."

The next section gives the Court the power to award a new writ, or dismiss the proceedings, or confirm the inquest.

The record, in the case at bar, is not at all clear, that the issues made were submitted for trial, by the parties, to the Court. It appears that *Wood* made a motion to dismiss the proceedings, and, upon that motion, evidence was heard "both in support of and against said motion, issues, and traverses joined." Now, if we are to regard this as a submission of the issues, to the Court for trial, then the submission was not of any particular issue, but of all, and the finding of the Court should have been upon all. If it is not to be regarded as a submission of the issues of fact, to the Court for trial, then the finding of the Court upon some of those issues was without authority, and the issues would remain undetermined. In either event, the question arises, whether the Court should have made an order, ratifying and confirming the inquest, with a part or all of the issues of fact thus raised upon that inquest, remaining un-

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v.  
WILSON.



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1859.

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v.  
WALKER.

disposed of. We are of opinion the issues of fact, upon the question of damage, should have been disposed of before the Court should have made an order of confirmation. Perhaps their determination might be presumed, if there had been a general order of confirmation. But here the record shows affirmatively that evidence upon certain of the issues was not considered, and consequently those issues were not determined, although such evidence was given by each party. If no part of the inquest had been traversed, nor issues of law or fact made, in reference to the proceedings, the Court could then, the matter being properly presented by motion or otherwise, have either set aside the inquest and ordered a new writ, as in point of fact was once done in the case, or dismissed the proceedings, or ratified and confirmed the inquest. *Chapman v. Groves*, 8 Blackf. 308.—*Peck v. Van Rensselaer*, *id.* 312. But where issues of fact are made, they should be disposed of in some way.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. S. Newman* for the appellant.

*J. B. Niles* and *A. L. Osborn*, for the appellees.

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#### PROCTOR v. WALKER and Others.

A sheriff has power to appoint a person to do a particular act, as, to serve a certain writ, although such person may not be a general deputy or act under the oath required of such deputy by statute.

A prisoner in the custody of a constable, is liable to arrest on process in the hands of a sheriff, at all events, if the constable be willing to surrender him.

Wednesday,  
June 29.

APPEAL from the *Hendricks* Circuit Court.

HANNA, J.—This was an action by *Proctor*, for assault and battery and false imprisonment. Defense, general denial; and, second, justification under legal process.



A demurrer was filed to the second paragraph of the answer, which was overruled. Upon this ruling, the first question is presented for our consideration.

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WALKER.

The answer avers that a writ for the arrest of the plaintiff was issued by the clerk of said county, out of the Court of Common Pleas thereof (which writ is set forth), to the sheriff thereof, returnable forthwith. That the sheriff "appointed the said defendant, *Walker*, bailiff for said Court, and placed said writ in his hands, as such bailiff." It then avers that said *Walker*, by virtue of said writ, with the other defendants as his assistants, arrested said plaintiff, which is the assault complained of, &c.

The cause of demurrer assigned is, that "the sheriff of said county had no power to appoint a bailiff, but a deputy under him in writing, who would be authorized to act as such, after taking the necessary oath," &c.

We are of opinion that the demurrer was properly overruled. The sheriff had power to appoint a person to do a particular act, as, to serve a certain writ, although he may not have been the general deputy, and have taken the oath, &c., as required of such deputy by the statute. *The New Albany, &c., Railroad Co. v. Grooms*, 9 Ind. R. 244.

The plaintiff replied to the second paragraph of the answer—1. A denial. 2. That, at the time he was arrested, &c., by defendants, he was in the hands and custody of a constable, &c., by virtue of a writ issued by a justice of the peace, on a charge of an affray, of which defendants had notice. That the charge upon which defendants arrested him was false, &c. 3. That the trespass, &c., was excessive in this, that the defendants bound him with cords, &c.

There was a demurrer to the second and third paragraphs of the reply—to the second, because it was not sufficient, &c., to the third, because it was a repetition of the matters alleged in the complaint. The demurrer was sustained as to the second, and overruled as to the third paragraph of the answer. The ruling as to the second paragraph raises the next question for consideration.

We are not aware of any statute which protects a man



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from arrest upon one charge and writ issued from a state judicial tribunal, because he may happen to be in the custody of an officer, under a different charge and writ issued by another Court of equal or inferior jurisdiction.

The plaintiff cites several cases which, he insists, sustains the positions taken by him; the first, is *Bours v. Tuckerman*, 7 Johns. 538. This was an arrest made of an individual, whilst attending upon a Court in obedience to the process thereof, in which he was protected from arrest, by statute. See, also, 1 R. S. p. 104.

The second, is *Love v. Humphrey*, 9 Wend. 204, which was an arrest made in the county of *Schenectady*, upon a writ issued by a justice of said county. The plaintiff who was thus arrested, was, at the time, in the custody of an officer of *Montgomery* county, by virtue of a writ issued by a justice of the latter county, and was being conveyed, by the ordinary route of travel, from the place where arrested, to and before said justice, and in traveling said route, passed over a part of the county first named, where he was thus arrested. The statute of *New York* expressly declared that a person thus arrested in one county, and passing through another, should not be liable to arrest in the latter, on civil process.

Whatever question might arise between the Courts and officers, as to the jurisdiction of the person of the defendant, we cannot perceive any good reason why he should not be subject to the process in the hands of the sheriff's officer, if the constable was willing to surrender him upon the same. Whether the constable could, of right, have held him against that officer, is a question not before us.

*Per Curiam.*—The judgment is affirmed with costs.

*C. C. Nave* and *J. Witherow*, for the appellant.

*H. C. Newcomb*, *J. S. Tarkington*, and *J. S. Miller*, for the appellees.



CRAFT *v.* CONOWAY.May Term,  
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*v.*  
WOOLLEY.

APPEALS from the *Dearborn* and *Carroll* Courts of *Wednesday, June 29.*  
Common Pleas.

*Per Curiam.*—These cases were submitted at the *November* term, 1856, and, as no briefs appear on file for the appellants, we presume, under the 28th rule of this Court, that the points made in the assignments of errors are waived, and the appeals are, therefore, dismissed.

The appeals are dismissed with costs.

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WOOLLEY *v.* WOOLLEY.

*Quare*, whether the code provides a substitute for the general common-law mode of setting aside a judgment or decree for fraud, where both parties appeared.

Under § 99, 2 R. S. p. 48, a judgment or decree could not be set aside one day after the expiration of one year.

*It seems*, that the common-law practice will not be revived to supply an omitted case, upon an application to set aside a decree for divorce and alimony; because the code has special provisions for the case, and it is not in accordance with the usages, the practice, or the legislation, in this state, to disturb judgments of divorce for any cause.

APPEAL from the *Sullivan* Circuit Court.

*Wednesday,  
June 29.*

PERKINS, J.—This was an application, under § 99, 2 R. S. p. 48, to set aside a judgment of divorce and alimony. The statutory provision is as follows: “The Court may, also, in its discretion, allow a party to file his pleadings after the time limited therefor; and at any time within one year, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings.” The application was filed the day before the year expired;



May Term, 1859. the judgment was set aside, so far as alimony was concerned, the day after the year expired.

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In *Robertson v. Bergen*, 10 Ind. R. 403, it is said there are five different cases in which Courts are authorized, in this state, to set aside judgments in civil actions. There are five, and perhaps more.

1. The Court may grant new trials for causes discovered after the term. See *McDaniel v. Graves*, at this term (1). But the application must be made within one year from the rendition of final judgment in the trial had. 2 R. S. p. 119.—*Id.* 167. This second provision applies to judgments in suits for the recovery of real estate. These provisions authorize the granting of new trials, and in the first, the language of the statute is, that the application must be made, and in the second, that the act may be done by the Court, within one year. See *Carlisle v. Wilkinson*, at this term (2).

2. The second class of cases is, that where a judgment may be relieved against for mistake, &c., being the class within which the pending suit is ranged. Here, also, the language of the statute is, that the act of the Court in setting aside the judgment, may be done within one year. The section is quoted above.

3. There are two classes of cases, which we will notice together, where judgments are rendered upon constructive notice, in which the judgments may be set aside.

One of these is where the judgments are against infants, and in which they may, for specified causes, be set aside within three years. 2 R. S. p. 289, § 177.

The other is where the judgments are rendered against adults; and, in which cases, they may have the judgments opened at any time within five years, except in cases of divorce.

None of the foregoing classes of cases embraces that of an application to set aside a judgment or decree for fraud, where there was an appearance by both parties—an equitable proceeding well known to the common law. We say none of these proceedings embrace such a case. Perhaps that for granting new trials may, to the extent to which



misconduct or fraud of the opposite party, had it been discovered at the term at which the trial took place, would have then been a ground for a motion for a new trial. But the question here is, does the revised code provide a substitute for the general common-law mode of setting aside a judgment or decree for fraud? See a valuable case on the subject in 7 Am. Law Reg., p. 591.

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v.  
WOOLLEY.

In answering the above inquiry, we are led to ascertain what the character and name of such a proceeding was at common law.

When the proceeding was instituted in the same Court, or, perhaps, class of Courts, in which the decree sought to be set aside was rendered, it was called an original bill in the nature of a bill of review. Story's Eq. Pl., p. 474. Also, note on p. 475.

Our statute provides for bills of review, except in cases of divorce, and our judgments are all in Courts pursuing chancery practice. 2 R. S. p. 165.

Perhaps this statute may be construed to embrace actions to set aside judgments for fraud. If so, the remedy of the plaintiff in this case is to file a complaint for that object.

Under the section upon which the present suit is founded, the Court could not set aside the judgment after the expiration of the year.

Perhaps the provision of the code (2 R. S. p. 119, § 356) is a substitute for a bill in chancery. Fraud is ground for a new trial. The legislature would have a right to limit the time within which such a bill should be brought. It would seem that we could not revive, it may be remarked, in such a case as this, any part of the former common-law practice, to supply an omitted case, for the reason that the legislature has, in the code of 1852, made special provisions in the case; and for the further reason, that it is not in accordance with the former usages and practice in this state to disturb, for any cause, judgments or decrees for divorce (see the successive codes); nor is it in accordance with current legislation. Acts of 1859, p. 109. But, as there is a case pending (*McQuigg v. McQuigg*), which



May Term, 1859. will, we are advised, involve these questions more directly, we here leave them undecided.

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v.  
ASKEY.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, with leave to amend, &c., if it can be done, so as to proceed in accordance with this opinion.

HANNA, J., was absent.

*J. P. Usher*, for the appellant.

(1) *Ante*, 465.

(2) *Ante*, 91.

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BRISCO v. ASKEY.

*Quære*, whether the word property, as used in the statute touching proceedings supplementary to execution (2 R. S. p. 152, § 518), includes only such lands, goods, &c., as are subject to execution in the first instance.

To extend this extraordinary remedy so as to include certain other means, the provisions of § 522 of the same statute must be complied with.

After the proper steps have been taken, in this respect, the Court should not order accounts to be sold on execution, but should order the defendant not to transfer them; and if the persons against whom the accounts exist, are parties, the order may forbid payment, or require payment on the judgment of the plaintiff.

Wednesday,  
June 29.

APPEAL from the *Lagrange* Court of Common Pleas.

HANNA, J.—This was a proceeding supplementary to execution, by *Askey* against *Brisco*, under the statute (2 R. S. p. 152, § 518), which provides, in substance, that after a return of an execution, &c., unsatisfied, the judgment-creditor shall be entitled to an order, &c., requiring the defendant to appear, &c., and answer concerning his property within the county.

The proceedings under §§ 518 and 519 are different. Under § 518, an order may issue without an affidavit. Under § 519, where proceedings are instituted after the execution has been issued, an affidavit must be filed that the judgment-debtor residing in the county has property



(describing it) which he unjustly refuses to apply towards the satisfaction of the judgment. This proceeding was evidently under the 518th section, for no affidavit was filed, nor did the complaint filed to obtain the order, describe any property.

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ASKET.

It appears from a bill of exceptions, that the defendant was sworn, and, upon his testimony, the order and judgment hereafter noticed, was entered. From that it is shown that he had property to the amount of 250 dollars' worth, which was all, including his household furniture, that he possessed, except certain accounts which were standing upon his books against various individuals; that offsets existed against some of them, but to what amount he did not know; that he had not fraudulently transferred or concealed any of his property, &c.

The persons who were thus apparently indebted to the defendant were not made parties to the proceeding. This, it is provided, may be done (§ 522), and they required to appear and answer, &c. But before they can be so required to appear, &c., an affidavit must be filed stating such indebtedness, and that the same, together with other property claimed by the defendant as exempt from execution, exceeds the amount of property so exempt.

The affidavit was not filed.

The order entered was, that "the defendant deliver to the sheriff of said county said claims and demands to be sold on the execution in this case, which is now done in open Court," &c., and that he be enjoined from collecting the same, &c.

This proceeding is wrong in several particulars. Whether the word property, as used in § 518, would include only such lands, goods, chattels, &c., as are, by law, subject to execution, in the first instance, without any extraordinary proceedings, we need not decide. To extend this extraordinary remedy, so as to include certain other means, the provisions of § 522 should be complied with. After the proper steps were taken, in that respect, the Court should not, in our opinion, have ordered the accounts sold on execution, but should have made an order that the



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BILSLAND.

defendant should not transfer them; and if the persons against whom the claims existed, had been parties, the order might have forbid them from paying the defendant, and have required the payment at maturity, &c., on the judgment of plaintiff. *Pursell v. Pappenheimer*, 11 Ind. R. 330.

There was nothing on the record which authorized the Court to inquire as to the claims concerning which the order was made.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*R. Parrett*, for the appellant.

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THE BOARD OF COMMISSIONERS OF FOUNTAIN COUNTY v.  
BILSLAND.

*Kent v. Lawson*, *post*, 675, followed.

Complaint upon an account stated, founded upon an order of a county board, a copy of which was filed therewith. It is stated in the order, that "The board now make settlement with *B.* in relation to the balance due said *B.*, as assignee of *P.* and *B.*, for erecting the county seminary building, which settlement is as follows." Then appear the charges and credits, running through several years, with the following at the end: "Leaving a balance due said *B.* on said contract, at this date, March 12, 1856, of 594 dollars, 27 cents, which is to be paid agreeably to the provisions of an order of this board in relation thereto, passed at its September session, 1856."

*Held*, 1. That the last clause quoted did not render it necessary to make averments different from those required in a complaint upon an account stated.  
2. That the clause in question was inoperative, because it states a condition to be made *in futuro*, which it was not shown could be made without the agreement of the plaintiff, by which some terms not disclosed were to be placed upon the payment of a sum acknowledged to be due by the former part of the entry; and because it was otherwise uncertain.

Wednesday,  
June 29.

APPEAL from the *Fountain* Circuit Court.

HANNA, J.—In this case, there was a demurrer to the complaint overruled. Trial and judgment for the plaintiff, *Bilsland*.



There was no motion for a new trial, and upon that the first question is made. It is insisted that if such motion is not made, no question can be raised here. In the case of *Kent v. Lawson*, at this term (1), it was held otherwise as to rulings on the validity of the pleadings.

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The causes of demurrer are, first, as to the parties; and, second, as to the sufficiency of the complaint.

The complaint is upon an account stated between the parties, and is founded on a record of the board upon that subject, a transcript of which is filed therewith. It is therein stated that "The board now make settlement with *John Bilsland* in relation to the balance due said *Bilsland*, as assignee of *William S. Patterson*, on the contract with *Patterson* and *Bilsland*, for erecting the county seminary building, which settlement is as follows." Then appear the charges and credits, running through several years, entered in figures, with the following words at the end of the calculation, to-wit: "Leaving a balance due said *Bilsland*, on said contract, at this date, *March 12, 1856*, of 594 dollars, 27 cents, which is to be paid agreeably to the provisions of an order of this board in relation thereto, passed at its *September* session, 1856."

But one point is made in the brief of appellant, and that is, as to whether the complaint shows a liability upon the part of the county,

Without doubt, the order entered upon the records of the board of county commissioners, in *March, 1856*, is a sufficient foundation for a complaint as upon an account stated, if the latter clause of it does not, in some way, change the liability of the board, or at least require additional averments, &c., by the plaintiff. We do not think that clause devolves upon the plaintiff the necessity of making averments in any manner different from those required in an ordinary suit upon an account stated, for the reason that the part of the entry, under consideration, is so informal, uncertain, and of such a tenor, if it speaks the truth, as to render it inoperative as a qualification of the then acknowledgment of unconditional indebtedness. It will be observed that the settlement and entry was made



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v.  
THE STATE.

in *March*, 1856, and the clause of the entry, which, it is insisted, is a qualification of the general acknowledgment of indebtedness, refers to an order made, relative to the payment thereof, at the *September* session, 1856—a time yet in the future—an order that could not possibly have been yet made. If it speaks the truth, it was inoperative, because it refers to a condition to be made sometime in the future, and which it is not shown could be made without the agreement of the plaintiff, by which some terms, not disclosed, were to be placed upon the payment of a sum by the former part of the entry acknowledged to be due. If the record did not speak the truth as to the date of the order relative to the payment, then it was so uncertain as to be so far inoperative that it might be disregarded by the plaintiff in filing his complaint. If the defendant could, by an answer, have placed it in a condition to avail him as a defense, he should have done so.

We do not decide whether the plaintiff should have set forth the order referred to, in regard to payment, &c., if the record had shown that such an order had been made previous to the time of said settlement; or whether it ought more properly to have been brought forward as a matter of defense.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*W. H. Mallory* and *C. Tyler*, for the appellant.

(1) *Post*, 675.

12	695
136	220
12	670
159	65

#### FRENCH v. THE STATE.

If an indictment is conveniently legible, it will not be held bad because it contains interlineations; and in the absence of anything appearing upon the face of a written instrument, or being shown extrinsically, tending to prove that interlineations were made subsequently to its execution, it will be presumed they were made before or at its execution.

In the absence of anything tending to show the contrary, if the record recite a



jury of twelve lawful men, it will be presumed that the panel of jurors possessed the requisite qualifications.

For evidence deemed sufficient to sustain a verdict of guilty, on an indictment for murder, see the opinion, point 3.

The Court, in this case, gave the following instruction: "Evidence which tends to establish the defendant's guilt, also tends, in an equal degree, to prove that he was present at the time and place when and where the deed was committed; and, if he seeks to prove an *alibi*, he must do it by evidence which outweighs that given for the state, tending to fix his presence at the time and place of the crime." *Held*, that this was error; that if the evidence on behalf of the prisoner raises a reasonable doubt of the truth of the charge, he must be acquitted, and this doubt may arise from the whole of the evidence in the case; that the rule is in nowise different in a case where the defendant sets up an *alibi*, from what it is where other affirmative matter is relied on.

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### APPEAL from the *Carroll* Circuit Court.

Wednesday,  
September 7.

PERKINS, J.—*William French* was indicted for the murder of *Hannah Briney*, was convicted, and sentenced to suffer death. He has appealed to this Court, and claims that the judgment against him should be reversed for the following reasons:

1. Because the Circuit Court refused to sustain his motion to quash the indictment.

The objection to the indictment was that it contained interlineations.

If the indictment was conveniently legible, it would not be bad simply because it contained interlineations; and, in the absence of anything appearing upon the face of a written instrument, or being shown extrinsically, tending to prove that interlineations were made subsequently to the execution of the instrument, it will be presumed they were made before or at its execution. *Stoner v. Ellis*, 6 Ind. R. 152.

2. Because the jurors by whom he was tried are not shown by the record to have possessed the statutory qualifications.

In the absence of anything tending to show the contrary, in cases where the record recites a jury of twelve lawful men, it will be presumed that the panel of jurors did possess the requisite qualifications. Ind. Dig., pp. 364, 546.



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THE STATE.

3. Because the verdict was not sustained by the evidence.

It appears that on the morning of the 26th of November, 1858, *Hannah Briney* was living, and in good health; that she was about nineteen years of age, and had been married between eight and nine months. She was advanced near six months in the state of pregnancy. About nine o'clock, in the morning of that day, her husband left her in the family residence, but just ready to start to go to the house of a brother to spend the day. Her hair was put up, her bonnet and shawl were brought out and hung upon a chair, and she was standing in the door. At night, about dusk, the husband returned home. The bonnet and shawl of the wife were hanging upon the chair where they were when he left in the morning, but the wife was not in the house. Upon search, her body was found in the well, in a position indicating that she might have fallen or been thrown in backwards. Her hair was disheveled, and filled with burs and twigs, and her body was naked. Her clothes, torn to rags, were in the well, some of them in the tin bucket which had been used by the family for drawing water from the well, and which was found in the bottom. There was no curb or guard around the well. There were burs and brush in the yard about the house, and not far distant from the well; but whether any were floating in the well does not appear. There were no marks of violence upon the body.

There was evidence tending, though but slightly, to show that *French* had been seen in the public highway, about three quarters of a mile from the house, and going in an opposite direction, in the afternoon of the day of the death of Mrs. *Briney*.

It would appear that *French* was an uncouth, repulsive appearing man, and a stranger in the neighborhood of *Briney's*. Two witnesses testified that *French* confessed to them that he called at the house of Mr. *Briney*, and found Mrs. *Briney* there alone; that he inquired if her husband wanted to hire help, and was answered in the negative; that he took the woman for a whore, and asked



her to grant him sexual indulgence; that she hesitated a little; whereupon he took hold of her, and she yielded; that he threw her down a second time amongst the brush in the yard; that after he had started to leave, he said to her that he had a mind to throw her into the well, and she replied that he was not man enough for that; whereupon he turned back, seized her and threw her in.

There was evidence tending to prove that on the 26th of *November*, 1858, *French* was at work for Mr. *James Pepper*, in *Pulaski* county, some fifteen or twenty miles from the residence of *Briney*.

The evidence, it will be seen, consisted of confessions. Like evidence of an *alibi*, that of confessions is to be received with great caution. 1 Greenl., p. 320. If the jury believed the evidence on the part of the state, and disbelieved that on the part of the defense, we think they might find the defendant guilty.

4. Because the Court gave the jury the following instruction:

"Evidence which tends to establish the defendant's guilt, also tends, in an equal degree, to prove that he was present at the time and place, when and where the deed was committed; and, if he seeks to prove an *alibi*, he must do it by evidence which outweighs that given for the state, tending to fix his presence at the time and place of the crime."

This instruction is not in accordance with the general rule of law, as applied either in civil or criminal cases; for in the former, the defendant is not bound to produce evidence which outweighs that of the plaintiff. If he produces evidence that exactly balances it, so as to leave no preponderance, he defeats the suit against him.

And in criminal cases, the rule is, that if the defendant produces evidence which raises a reasonable doubt of the truth of the charge against him, he must be acquitted. And this doubt may arise upon the whole of the evidence in the case. "Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient to convict, unless it generate full belief of the fact of guilt,



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2. Payment.

3. That by reason of the ignorance and unskillfulness of the plaintiff in doing the work, the defendant suffered damages to the amount of 100 dollars.

Replication in denial of the second and third paragraphs of the answer.

Trial by the Court, a jury being waived.

The Court found that there was due the plaintiff, from the defendant, the sum of 235 dollars, 38 cents, on account of the work and labor, and that the same was a lien upon the premises; and judgment was entered accordingly.

There was no motion, either for a new trial, or in arrest of judgment.

The errors assigned are—

1. The refusal of the Court to continue the cause, on application of the defendant, on affidavit filed.

2. That there was no finding upon two of the issues joined.

3. That judgment should have been rendered for the appellant.

We will examine the errors in an inverse order to that in which they are assigned.

The third is too general, and raises no question for our decision. *King v. Wilkins*, 10 Ind. R. 216.

The second is not true in point of fact. The Court finds there is due from the defendant to the plaintiff, a certain sum for the work and labor, and this is a substantial finding upon the second and third paragraphs of the answer, as well as upon the first. But were this not the case, it may well be doubted whether the appellant could raise the question, for the first time, in this Court, and avail himself of the objection, having made no motion, either for a new trial, or in arrest of judgment.

The error first assigned (if one was committed), was waived by the neglect of the defendant to move for a new trial.

We are of opinion that any matter, for which a new trial may be granted, is waived by the neglect of the party to move for a new trial.



By § 355, of the code, it is provided that a new trial may be granted in the following cases:

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*First.* Irregularity in the proceedings of the Court, jury, or prevailing party, or any order of Court, or abuse of discretion, by which the party was prevented from having a fair trial.

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*Second.* Misconduct of the jury or prevailing party.

*Third.* Accident or surprise, which ordinary prudence could not have guarded against.

*Fourth.* Excessive damages.

*Fifth.* Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury and detention of property.

*Sixth.* That the verdict or decision is not sustained by sufficient evidence, or is contrary to law.

*Seventh.* Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

*Eighth.* Error of law occurring at the trial, and excepted to by the party making the application. But not more than two new trials shall be granted in the same cause to the same party.

The overruling of a motion for a continuance of a cause is clearly within the first specification of the above section, and, perhaps, within some of the others.

It is unnecessary for us now to undertake to specify particularly what matters would, and what would not, come within the above provision; but some matters of common occurrence may be named. Thus, errors in rejecting proper, or in giving to the jury improper, testimony, or in giving to the jury improper charges, or refusing proper charges, are clearly within the eighth specification, while errors committed by the Court in reference to the validity of the pleadings in an action, are not within the section at all.

This construction is entirely in harmony with the spirit of the code, and is sanctioned by the previous adjudications of this Court. *Stump v. Fraley*, 7 Ind. R. 679.—*Zeh-*



May Term, 1859. *nor v. Beard*, 8 *id.* 96.—*The State v. Swarts*, 9 *id.* 221.—*Howes v. Halliday*, 10 *id.* 339.

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In the language of Judge STUART, in *The State v. Swarts*, *supra*, "It is due to the lower Court that its errors, if any, should be pointed out there, so that it may retrace its steps while the record is yet under its control. Without a motion for a new trial, the attention of the Court is not called to its own errors."

Numerous other cases might be cited, were it necessary, establishing the proposition that for causes coming within the sixth specification of the above section of the statute, a motion for a new trial must be made in the Court below, in order to present any question for the determination of this Court.

The same principle will require such motion to be made for every cause specified in the statute, for which a new trial may be granted.

It may be further remarked, that § 356 provides that the motion shall be made upon written cause, filed at the time of making the motion; and that, for causes mentioned in the second, third, and seventh clauses of § 352, the motion must be sustained by affidavit.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.



AN INDEX  
TO THE PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

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A.

ACCOUNT.

See LIMITATIONS, 1.

ACCOUNT STATED.

Complaint upon an account stated, founded upon an order of a county board, a copy of which was filed therewith. It is stated in the order, that "The board now make settlement with *B.* in relation to the balance due said *B.*, as assignee of *P.* and *B.*, for erecting the county seminary building, which settlement is as follows." Then appear the charges and credits, running through several years, with the following at the end: "Leaving a balance due said *B.* on said contract, at this date, March 12, 1856, of 594 dollars, 27 cents, which is to be paid agreeably to the provisions of an order of this board in relation thereto, passed at its September session, 1856."

*Held*, first, that the last clause quoted did not render it necessary to make averments different from those required in a complaint upon an account stated.

Second, that the clause in question was inoperative, because it states a condition to be made in *futuro*, which it was not shown could be made without the agreement of the plaintiff, by which some terms not disclosed were to be placed upon the payment of a sum acknowledged to be due by the former part of the entry; and because it was otherwise uncertain.—*The Board of Comm'rs, &c. v. Bilsland*, 668.

ACTION PENDING.

See PLEADING, 18.

ADMISSIONS.

See BILLS OF EXCHANGE, 4.

See INFANCY, 2.

AD QUOD DAMNUM.

See DAMAGES, 8.

*By Guardian.]*



## AFFIDAVIT.

See CONTINUANCE; JUDGMENT BY CONFESSION; JUDGMENT BY DEFAULT, 4, 5, 6; NEW TRIAL, 4, 5, 9.

## AGENCY.

1. An agent employed to drive stock from one place to another, has no power in virtue of such employment to sell the stock, in case it become foot-sore and unable to travel; and in case of a sale under such circumstances, the owner may recover his property by action against the purchaser.—*Reitz v. Martin*, 306.
2. Where the principal has never held the agent out as having a general authority, it is the duty of one purchasing from him to inquire as to the extent of his authority; and, if he purchase without inquiry, he trusts the agent and not the principal.—*Ibid*.

## ALIBI.

See CRIMINAL LAW, 4.

## ALTERATIONS.

See EVIDENCE, 7.

## AMENDMENT.

*Of Judgment, &c.*]

See JUDGMENT, 1.

## AMICUS CURIÆ.

1. An attorney who appears as a mere *amicus curiæ*, has no right, in that character, to except to the rulings of the Court.—*Campbell v. Swasey et al.*, 70.
2. A party may enter a special appearance and move to set aside defective process, and will not thereby waive the right to object to such defects.—*Ibid*.

See, also, *Hust v. Conn*, 257.

## ANIMALS RUNNING AT LARGE.

In the enactment of the statute touching animals running at large (1 R. S. p. 102), the legislature contemplated the promotion of agricultural interests rather than the protection of railroad property.—*The New Albany and Salem Railroad Co. v. Tilton*, 3.

See RAILROAD COMPANY, 1 to 6.

## APPEAL.

1. Where a part of the appellants are barred by the statute of limitations, their names may be stricken from the record, and the cause may proceed as to the parties not barred.—*McEndree et al. v. McEndree*, 97.
2. Where a question upon a demurrer had been decided on a former appeal in the same case at a former term, the demurrer is not a necessary part of the record on another appeal.—*Galling v. Newell et al.*, 116.
3. Where there is service upon a resident attorney of a non-resident appellee, of notice of the appeal, no further notice is, in general, necessary.—*Hurlbut v. Hurlbut*, 346.



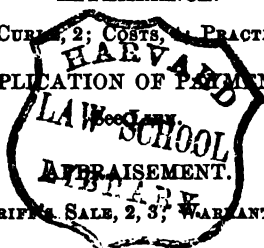
4. Suit by *A.* against *F.* and others on a bond, by which the defendants became bound to pay certain debts, in consideration of the sale by *A.* to *F.* of his interest in a certain partnership between them. While the cause was pending, on affidavit of the plaintiff, the Court made an order appointing a receiver to collect and receive the partnership effects. From this order, the cause not having been finally disposed of, *F.* appealed to this Court. *Held*, that this is not a "final judgment" from which an appeal lies to this Court, under § 550, 2 R. S. p. 158; nor is it such an interlocutory order as may be appealed from under § 576. The first specification of this section contemplates "the delivery or assignment of any securities, evidences of debt, documents, or things in action" to a party, and not to a receiver who may be appointed to receive effects to be disposed of on the final disposition of the cause.—*Fuller et al. v. Adams*, 559.

See BILL OF EXCEPTIONS; DAMAGES, 3, 4; JUDGMENT BY DEFAULT, 8.

# APPEARANCE.

See AMICUS CURIAE, 2; COSTS, 11; PRACTICE, 14, 17, 18.

# APPLICATION OF PAYMENTS.



See SALE, 3; SHERIFF'S SALE, 2, 3; WARRANT OF ATTORNEY, 2.

# ARBITRATION AND AWARD.

1. An award of arbitrators is not void because on its face it does not purport to be an award.—*Saunders v. Heaton et al.*, 20.
2. In a suit upon an award, the question whether a paper filed is, in fact, the award of arbitrators, is matter of averment and proof; and such proof may be made without violating the rule that parol evidence shall not be admitted to contradict or vary a written instrument.—*Ibid*.
3. Where the question submitted to arbitrators was the value of work done on a house, and the award showed specifically the work, and attached to each item the value put upon it,—*held*, that the award followed the submission and was sufficient.—*Ibid*.
4. And in a suit upon the award, it is no defense to say that it was for more than by a previous agreement was to have been paid for the work, if no such agreement is referred to by the terms of the submission.—*Ibid*.
5. Where no time is specified in the bond for the making of an award, it may be made at any time, and if it be signed by one of the arbitrators and delivered to one of the parties, it may afterwards be signed by the other arbitrator, and it will be good.—*Ibid*.
6. Suit upon an award. By the submission, the arbitrators were to "arbitrate all debts, dues, notes, judgments, and demands whatever, of every kind and nature, between the parties." The award was as follows: "We, the arbitrators, having taken upon us the burden of the reference, and having duly considered the allegations and proofs of the parties, do make and publish this our award, of and concerning the matters to us referred, viz: We find for *Enoch Miller* 4,329 dollars, including the *Enoch Hays* judgment in the *United States District Court*, and the judgment of *Jacob Hays* against *Benjamin Redman, jun.*, in replevin," &c. Signed, &c. A copy of the award was filed with the complaint. It was objected that the complaint was defective for not averring that the award was made of and concerning the matters submitted.



*Held*, first, that the award was part of the complaint, and contained the necessary averment. Second, that the award is not uncertain for including the judgments to which it refers, in making up the aggregate.

Third, that although the judgments were not originally between the parties, it may be presumed, in view of the whole award, that, at the time of the submission, they had become existing demands between them, and were properly within the submission.—*Hays v. Miller*, 187.

7. A submission to arbitrators, where no cause is pending, and where there is no agreement to make the submission a rule of Court, is the mere act of the parties; and in an action to enforce the award, it is no defense to say that it is against law.—*Ibid*.

8. An award, to be of any validity, must, under the statute, be signed by an attesting witness, before the expiration of the official existence of the arbitrators.—*The New Albany, &c., Railroad Co. v. McPheters*, 472.

9. Where part of an award relates to matters not within the terms of the submission, the whole award will be void unless that part can be distinguished from the residue.—*McCullough v. McCullough*, 487.

10. Where an award thus embraces matters not authorized by the submission, the whole award will be void, unless it can be shown that such unauthorized part was so disconnected from the residue as to have no influence upon the consideration thereof.—*Ibid*.

11. Where a party undertakes, in his pleadings, to show that part of an award was unauthorized by the submission, and to maintain the residue, to entitle him to succeed, he must prove, 1. That the part which he seeks to have rejected relates to matters not submitted to the arbitrators; 2. That the residue is so distinct and complete in itself as to constitute a valid award after its rejection; and, 3. That it had no influence upon the consideration of the residue.—*Ibid*.

12. Where two of the arbitrators in such case, are called and examined as witnesses touching the matters submitted to them, and their testimony is conflicting, a writing signed by them, and containing that part of the award sought to be rejected, after it has been submitted to them, is competent evidence, to be considered by the jury in determining the relative weight that ought to be given to the testimony of such witnesses.—*Ibid*.

See INTEREST, 2.

#### ARREST OF JUDGMENT.

See PRACTICE, 9.

#### ASSESSMENT OF DAMAGES.

See DAMAGES, 2 to 5, 8.

#### ASSIGNMENT.

1. *A.* was convicted and sentenced to the state prison by a Court of Common Pleas, for an offense of which that Court had not jurisdiction. He was confined at hard labor from June, 1853, till November, 1854, when he was released on a *habeas corpus*. He assigned his account for the work and labor done during that time for the lessee of the prison, to *B.*, who brought suit against the lessee, joining *A.* as a party defendant, to recover the amount of the account. *Held*, that the assignment was good, and *B.* could recover, in his own name, against the lessee, as upon an implied contract, for work and labor done with his knowledge, and at his request, although *A.*, while a prisoner, was under the control of the warden of the prison.—*Patterson v. Crawford*, 241.

2. An assignee takes precisely the same interest in the assignment of any species of demand,



- either at law or in equity, that he would have taken before the enactment of the new code. Thus, a demand assignable before the code, so as to vest the real interest in the assignee, will pass by assignment under the code, so as to give the assignee a right of action.—*Ibid.*
3. That an account was assigned in writing, cannot change the rule as to parties; because an account is not made assignable by statute, by indorsement, so as to vest the legal title. The assignment in writing, therefore, is but an equitable assignment. In a complaint upon an account and assignment, the interest of the plaintiff must be averred, as well as the indebtedness of the defendant; and while the written account itself cannot be regarded as the foundation of the action, like other written instruments, it would seem that the written assignment of it might be set out and filed with the complaint, as other written instruments, so that, not being denied on oath, it would be admitted. The account itself, however, would have to be proved. The assignment, being a formal written instrument, signed by the party, would seem properly to stand on the footing of other written instruments. The assignee of an open account may sue upon it in his own name.—*Overstreet v. Freeman*, 390.
  4. The assignee of an equitable title to land, takes it subject to all existing equities.—*Thompson et al. v. Allen et al.*, 539.
  5. The assignee of a covenant for the conveyance of real estate is not entitled to demand specific performance thereof, unless his assignor was in a situation to have demanded it.—*Ibid.*

See DOWER, 1, 2; JUDGMENT, 1; MORTGAGE, 1, 4.

*Of Error.*]

See ERROR, 1, 2.

#### ATTORNEY AND CLIENT.

1. In a difficult case, an attorney should advise his client to the best of his judgment; but if the client is unwilling to follow his advice, it is safer for the attorney to follow the client's instructions, so far as the rules of law may permit.—*Nave v. Baird*, 318.
2. But if the attorney does not do so, and the client sues for damages, he must show, presumptively, that he was injured by the course taken by the attorney, in order to recover more than nominal damages.—*Ibid.*
3. As a general rule, an attorney cannot, as a witness against his client, disclose confidential communications; but the rule does not apply where the client sues the attorney for disobeying instructions alleged to have been given in such consultations, and for unskillfully managing a cause upon information given by the client in them.—*Ibid.*

See AMICUS CURLE, 1; JUDGMENT BY DEFAULT.

#### B.

#### BAILMENT.

See CONTRACT, 6.

#### BANKS AND BANKING.

1. Under the statute regulating "the business of general banking" (1 R. S. p. 152), a bank cannot set up, in defense of a suit to compel the transfer of stock, or for damages, that the assignment of the certificate of stock was for an illegal consideration, if the bank has no claim upon the stock for debts due from the assignor.—*Helm, President, &c. v. Swiggett*, 194.
2. Ownership of a certificate of stock in a bank does not constitute the owner a stockholder, without the transfer of the stock to him on the books of the bank.—*Ibid.*



3. The act "to authorize the business of general banking," approved May 28, 1852, was repealed by that of 1855, upon the same subject.—*Wilson v. Tesson et al.*, 285.
4. Banks organized under the former act, refusing to comply with the provisions of the latter, ceased to exist as corporations at the time therein prescribed; and no judgment of forfeiture was necessary, to terminate their corporate powers.—*Ibid.*
5. A contract made by the officers of such bank, in their corporate capacity, after its powers as a corporation had ceased, does not bind the stockholders.—*Ibid.*

#### BILL OF EXCEPTIONS.

1. Cause tried October 12, 1855. Order by the Court, upon overruling a motion for a new trial, that the defendant should file his bill of exceptions to that ruling in sixty days. Bill filed January 4, 1856. There was nothing to show that it was then filed by leave of Court. Held, that the errors assigned could not be considered.—*Simonton v. The Huntington, &c., Plankroad Co.*, 380.
2. When the Court decides against a party on demurrer, he may except to the ruling of the Court by bill of exceptions; and, when such bill states that "after hearing the argument the Court sustains the demurrer, to which opinion of the Court the plaintiff excepts," it is sufficiently shown that the exception was taken at the time.—*Pace v. Oppenheim et al.*, 533.
3. In such case no bill of exceptions is necessary.—*Ibid.*

See REFERENCE, 2.

#### BILLS OF EXCHANGE.

1. A notarial protest of a bill of exchange, showing that on the day when the bill became payable it was presented to the book-keeper of the drawee, at his office, &c., is presumptive evidence of the facts stated in it, and is admissible in evidence in a suit upon the bill.—*Dickerson et al. v. Turner et al.*, 223.
2. Whether or not such a protest is sufficient to prove a proper presentment, is a question that could not arise on the objection to its admissibility.—*Ibid.*
3. Circumstances rendering such a presentment proper, may be proven aside from the protest, if such proof be necessary.—*Ibid.*
4. The plaintiffs in this case proved that, since the suit was commenced one of the attorneys for the plaintiffs, being surprised at learning that a defense would be set up, took one of the defendants aside, viz., *Charles Dickerson*, and had a conversation with him in reference to the bill. Witness presented the bill to *Dickerson*, and asked him if he was liable upon it. *Dickerson* replied that he was willing to stand as surety upon it. Witness told him he was liable or not, and if liable he wanted to know it, and if not, he wanted to know it. *Dickerson* then gave the witness a detailed history of the bill, and the matters out of which it grew. He said the bill was signed by his son, *Hendricks Dickerson* (now deceased), who was one of the firm of *Dickerson, Bethell & Co.* (the firm name in which the bill is drawn), that firm being composed of said *Charles Dickerson, Hendricks Dickerson, Chester Bethell*, and *Frank Bethell*; that *Chester Bethell* and *Aaron Shelby*, composing the firm of *Shelby and Bethell*, owed an old debt to *Turner and Wilson*, the plaintiffs, and this bill was drawn by the firm of *Dickerson, Bethell & Co.*, and indorsed by *Chester Bethell*, to secure the plaintiffs the old debt. Witness told *Dickerson* that if the bill was drawn in that way, he was liable upon it. *Dickerson* admitted he was liable as surety for *Chester Bethell*; that it was *Chester's* debt; and that he, *Hendricks* and *Frank Bethell* were sureties in the bill for *Chester*. Witness inquired of him why they were putting in a defense to the action. He replied that the debt was just, but there was a settlement to be made between the plaintiffs and *Chester*



*Bethell.* Witness then called his attention to some indorsements of credits on the bill, remarking that those showed that a settlement had already been made. *Dickerson* said he knew nothing about that settlement, but then said that *Chester Bethell* wanted to delay the case until he could hear from his old partner, *Shelby*, who had gone to *Oregon*, and who was a good deal behind with him; that he expected funds from him, or expected, in some way, to throw off the payment of this bill, or a part of it, on to *Shelby*, from whom he expected to hear at every mail.

*Held*, first, that it seems that accommodation drawers, who unite as drawers with the person for whose accommodation they draw, are entitled to notice of non-payment, if they had reason to expect their principal to provide funds to meet the bill.

Second, that the admission, by one of the drawers, of liability as surety, and that the debt was just, was sufficient evidence of a proper presentment and notice of non-payment.

Third, the bill, being in evidence, showed the drawers to be joint contractors; and the admissions of one of the drawers bound his co-contractors—they stood, in this respect, in a relation similar to that of existing partners.

Fourth, that an order that the sheriff levy the execution to be issued upon the judgment in this case, upon the property of *Chester Bethell*, and exhaust that, before a levy should be made upon property of the other defendants, upon the ground that he was the principal, and the others sureties, was erroneous, being based wholly upon the admissions of one of the other defendants.—*Ibid*.

5. Suit by the assignees against the acceptors of a bill of exchange payable at a bank in *Indiana*. Answer, that the bill was given in consideration of a quantity of pig iron, which was warranted to be of a certain quality; that it was not of the quality warranted; that the assignees knew the consideration of the bill; and that they were agents of the payees of the bill. Demurrer sustained on the ground that by § 81, 2 R. S. p. 44, the law merchant is so changed that no defense can be set up to a bill payable at a bank, against a *mala fide* assignee.

*Held*, first, that the section referred to simply enacts the rule of the law merchant, and is applicable to *bona fide* assignees.

Second, but that the demurrer was correctly sustained, because of the indefiniteness of the answer.—*Hubler et al. v. Pullen et al.*, 567.

### BRIEF.

A brief must contain an abbreviated statement of the pleadings, proofs, affidavits, &c., with a concise narrative of the facts of the case, and a summary of the points involved, with a citation of authorities, if any are relied upon, and an argument upon all these, characterized by perspicuity and conciseness.—*Parker et al. v. Hastings*, 654.

### C.

### CARRIERS.

1. Where goods transported by a railroad arrive at the place of destination, and are placed upon the platform of the depot, at the usual place of discharging goods, ready for delivery to the consignee, in good order, and he is notified of their arrival, and pays the freight upon them, the liability of the company as carriers is at an end.—*The New Albany and Salem Railroad Co. v. Campbell et al.*, 55.
2. If the consignee does not receive the goods, it seems that the carrier must take care of them for a reasonable time for the consignee; but his liability in that respect is that of a warehouseman, and not that of a carrier.—*Ibid*.



3. But where the consignee has notice of the situation of the goods at the place of delivery, and pays the freight upon them, and afterwards, without neglect on the part of the warehouseman, the goods are destroyed, the warehouseman is not liable.—*Ibid.*
4. *It seems*, indeed, that the payment of the freight under such circumstances, without any arrangement as to the further custody of the goods by the warehouseman, is equivalent to a delivery, so far as to throw the risk of loss upon the consignee.—*Ibid.*

#### CASES OVERRULED, MODIFIED, APPROVED, &c.

NEWELL ET AL. v. GATLING, 7 Ind. R. 147, affirmed, in a case between the same parties, 118.

A case between the same parties, 9 Ind. R. 572, modified. *Ibid.* See CONTRACT, 4.

ROCKHILL v. SPRAGGS, 9 Ind. R. 30, followed. *Jones et al. v. Jones*, 389.

STRONG v. BRAGG, 7 Blackf. 62, overruled. *Strong v. Clem*, 37. See DOWER, 3.

THE UNKNOWN HEIRS OF WHITNEY v. KIMBALL, 4 Ind. R. 546, approved. *Johnson et al. v. Patterson et al.*, 471. See PUBLICATION.

#### CERTIORARI.

A *certiorari* will not be granted pending a motion to submit the cause to this Court on a petition for a rehearing, at all events if no excuse be shown for a failure to make the application before the former submission.—*Gatling v. Newell et al.*, 116.

#### CHANCERY.

1. As a general rule, if a party suffer judgment to pass in a matter wherein he might have availed himself of a defense at law, chancery will not relieve him; but the rule applies only in cases where such a defense would authorize a Court of law to render a party full relief, in the case presented by the evidence.—*Murphy et al. v. Blair*, 184.
2. Where a party could have set up the facts stated in a bill in chancery, under the general issue in ejectment, but success in that action would have resulted in an unqualified judgment, because a judgment, a sheriff's sale, and certain deeds, referred to in the bill, would still be outstanding as clouds upon the title, it was *held* that the party might resort to a Court of equity, and that that Court might determine the whole controversy.—*Ibid.*
3. Where the setting aside of an execution is all the relief to which a party is entitled, it must be sought in a Court of law; but it may be well sought in a Court of equity, in connection with relief not attainable at law.—*Ibid.*

#### CLERICAL ERROR.

See EXCEPTIONS, 1; JUDGMENT, 1.

#### CONFESSION OF GUILT.

1. At common law, it is for the Court, and not the jury, to decide whether, under the circumstances of the case, a confession of guilt is admissible; but the statute allows all confessions, save those produced by threats, to be given in evidence.—*The State v. Freeman*, 100.
2. The words addressed to the accused must involve a threat; and the motive to confess, produced thereby, must be such as to so operate on his mind as to render it doubtful whether the confession is worthy of credit.—*Ibid.*
3. Prosecution for stealing three twenty-dollar gold-pieces. The defendant, upon his arrest,



was told that there was "no use in denying it; that the gold-pieces had been found where he passed them; that he had better own up to it." He then confessed the larceny. *Held*, that this language was that of inducement, and that, under the statute, the confession was admissible in evidence.—*Ibid*.

### CONFESSION OF JUDGMENT.

See JUDGMENT BY CONFESSION.

### CONSIDERATION.

See DEED, 5; PROMISSORY NOTES, 2.

### CONSTITUTIONAL LAW.

1. An act of 1859 is entitled "An act to amend section eleven of an act entitled 'An act to establish Courts of Common Pleas, and defining the jurisdiction and duties of, and providing compensation for, the judges thereof,' approved May 14, 1852—so as to extend the jurisdiction of said Court in certain cases." *Held*, that the latter part of the title embraces § 2 of the act, extending or increasing the jurisdiction of the Court in criminal cases.—*Reed v. The State*, 641.
2. It is not necessary, under the constitution, that all matters properly connected with the principal subject-matter of a statute shall be expressed in its title.—*Ibid*.
3. Section 1 of the act above mentioned sets out and amends § 11 of the act of 1852, touching the civil jurisdiction of the Common Pleas, and § 2, extending the jurisdiction of the Court in criminal cases, is added. *Held*, that the subject-matter of the act of 1852 was the jurisdiction of the Court, and that of the act of 1859, was the increase of that jurisdiction; and hence, § 2 of the latter act is a part of the amendment of § 11 of the former act.—*Ibid*.
4. The mode of initiating and conducting prosecutions for criminal offenses must be uniform in the same Court, but it may be different in different Courts. Thus, in the Circuit Court, prosecutions for felonies are initiated by indictment; but under the act of 1859, they may be commenced in the Common Pleas by affidavit and information.—*Ibid*.

See DOWER, 5; LOTTERY, 2; OFFICE, &C., and *Waldo v. Wallace*, 569, at length; RAILROAD COMPANY, 1.

### CONTINUANCE.

1. An application for a continuance cannot be repeated upon a second affidavit upon the same facts stated in the first.—*Garrett v. Garrett*, 407.
2. An affidavit for a continuance omitting to state that affiant believes the facts set out to be true, is insufficient.—*Fausett v. Voss*, 525.

See INTERROGATORIES, 2; PRACTICE, 27.

### CONTRACT.

1. Where representations, as to the superiority of a patented machine, and the demand for it, are confined to general statements or expressions of opinion, upon facts equally within the knowledge, or open to the reasonable inquiry of either party, a right to rescind a contract of purchase of the patent could not arise, as a matter of course, because of the falsity of such representations.—*Galling v. Newell et al.*, 118.
2. Representations touching the existence of circumstances connected with, and the terms of,



contracts at various places for the manufacture and sale of a patented machine, are such, that the law presumes the party making them (in this case the vendor of the patent) to be fully cognizant of their truth or falsity; and such representations having relation, in this case, to the income derived from the machine, and to private contracts to which the other contracting parties (the vendees of the patent) were strangers, they were not open, as a matter of right, to their inquiry pending negotiations for the purchase; but they were, nevertheless, such representations as they had a right to rely upon.—*Ibid.*

3. *Semble*, that a complaint may ask a rescision of a contract, or, if that cannot be had, damages for its violation.—*Ibid.*
4. The case between these parties, reported in 9 Ind. R. 572, modified in this: that it gives too great weight to the intrinsic value of the patent, in determining the validity of certain contracts for its manufacture and sale.—*Ibid.*
5. Suit upon a written agreement for the delivery of four thousand bushels of corn on board of a canal boat—two thousand bushels to be delivered on the 20th of *August*, 1856, and two thousand bushels on the 30th of the same month. Five hundred dollars was to be paid down, 500 dollars on the 8th of *August*, 1856, and 200 dollars "upon the delivery of each load," in all, 1,400 dollars. The complaint averred that the defendant was engaged in buying corn, and possessed a warehouse, at which the corn was to be delivered on board the boat. There was no controversy about the two thousand bushels first to be delivered. It was averred that before the 30th of *August*, at the instance of the defendant, the time for the delivery of the last two thousand bushels was extended, by agreement of the parties, without fixing any day for performance; and that on the 3d of *September*, 1856, the defendant informed the plaintiffs that the last two thousand bushels was ready for delivery whenever they would send a boat (but no day was fixed for such delivery), and requested payment, which was made. General averment of performance on the part of the plaintiffs, and that on the 6th of *September*, 1856, they demanded, and were ready to receive, said two thousand bushels; but that the defendant failed, and still fails, to deliver the same, nor did he have it to deliver. Answer, admitting the execution of the agreement, the payment of the money, and that the defendant was engaged in buying, &c., and averring that he delivered the first two thousand bushels; that at the time of payment in full, to-wit, *September 3*, 1856, he had on hand and ready for the plaintiffs, in his warehouse, the two thousand bushels yet at that time due upon the contract, and so informed the plaintiffs; that no arrangement as to the time of receiving the corn was made; that the corn not being called for by the plaintiffs, remained, &c., until the 6th of the same month, when it was destroyed by fire; wherefore it was impossible to put the same on board the boat; that the contract was fully performed by the defendant, except transferring the corn from the warehouse to the boat; that the property, after, &c., became and was the property of the plaintiffs, subject to their control. Demurrer, because the answer did not state facts sufficient, &c., sustained. Amended answer, admitting all the facts stated in the complaint, except the averments of performance by the plaintiffs, and averring that they did not perform in this, that they failed to send a boat within a reasonable time, *although the corn had been set apart and measured*, and was ready to be transferred to the boat at the time of the receipt of the full amount of the purchase-money, and remained so set apart, &c., until the morning of the 6th of *September*, when the same, yet being in the warehouse, by reason of the want of diligence upon the part of the plaintiffs, was destroyed by fire, &c. Demurrer, for the same cause as before, sustained. *Held*, that the original answer was bad, and the amended answer good on demurrer; that the admeasurement and setting apart of the corn, and the payment in full of the sum to be paid on delivery, completed the sale; that the transfer of the corn from the warehouse to the boat, although necessary to complete performance, was waived, as necessary to a completion of the sale.—*Scott v. King et al.*, 203.



6. *A.* placed four hundred bushels of wheat in the mill of *B.*, upon the terms that the latter might mix it with his own, convert it into flour when he pleased, sell the flour, and appropriate the proceeds to his own use, but that, whenever *A.* saw fit, he had a right to exact from *B.* the same quantity in kind of wheat, or the amount of flour so much wheat would make, or the then price of wheat per bushel, in money. After the delivery of the wheat, but before *A.* had made a demand of *B.* for anything in return, the mill, and the wheat then in store in it, were consumed by fire.

*Held*, that the contract was one of sale, and not of bailment, and the loss must fall on *B.*—*Carlisle v. Wallace*, 252.

7. Where the plaintiff's covenant or stipulation constitutes only a part of the consideration of the defendant's contract, and the defendant has actually received a partial benefit, and the breach on the part of the plaintiff might be compensated in damages, an action may be supported against the defendant, without averring performance by the plaintiff.—*Boyle v. Grysinger*, 273.

8. Where a party, before the time fixed for the performance of an agreement, disables himself to perform it on his part, no demand of performance is necessary.—*Ibid*.

9. Suit for the rescission of a contract for the conveyance of land, on account of fraud in obtaining the contract. The complaint alleged that one of the defendants was the plaintiff's agent for the care of the land and to procure a purchaser; that, in his correspondence as such agent, he fraudulently misrepresented the value of the land, and induced the plaintiff to sell it to the other defendant, who had notice of the fraud, for one-half its value—the defendants having a contract between themselves for the conveyance of one-half of the land to the agent, he furnishing half the purchase-money.

*Held*, first, that the correspondence was admissible in evidence to prove the agency, and, perhaps, the fraud.

Second, that the agent was a proper party to the suit.

Third, that the agent, being a proper party, could not testify as a witness in relation to matter going to defeat the action against both defendants, though he might testify as to matters affecting the recovery, or the amount of it, against his co-defendant alone.—*Roy et al. v. Haviland*, 364.

10. A party from whom a contract has been obtained by fraud, may have his action for its cancellation, though it be not signed by the defendant.—*Ibid*.

11. In a suit for the rescission of a contract for the conveyance of land, on account of fraud in obtaining the contract, the defendants answered that they had made valuable improvements, but did not describe them nor state their value. *Held*, that the matter was not well pleaded; and that if it had been, it is not clear that the defrauding party could avail himself of the defense to prevent a rescission.—*Ibid*.

12. Action by the appellees against the appellant to enforce the specific performance of a contract. The complaint alleges that, on the 1st of November, 1852, the defendant sold to the plaintiffs, a certain tract of land, and executed to them a title-bond, conditioned that he would, upon the payment of a joint note by plaintiffs, then executed to the defendant, for the sum of 60 dollars, payable on the 25th day of December, 1852, execute a deed, &c.; that on the 25th of December, 1857, and on, &c., the plaintiffs tendered the amount of said note, and interest, &c., and also a deed properly prepared, &c., and demanded that the same should be executed; that defendant refused to perform, &c.; that the money was brought into Court, &c. Prayer, that defendant be compelled to perform the contract, and for relief, &c. The defendant answered, that he did, on the day the note became due and the contract was to be performed, tender a deed, prepared in pursuance of said contract, and the note, to *McCoy*, one of said plaintiffs (the other having left the country), and demand payment of said note; that *McCoy* refused to pay the note, which was then surrendered to him,



and he abandoned the contract; that defendant, afterwards, in 1853, sold the land to one W., received the purchase-money therefor, and executed a deed; that W. had no notice of the contract of plaintiffs, &c. *Held*, that the answer was good on demurrer.—*Lane v. Ready et al.*, 475.

13. Where a party has received benefit from a contract, as a conveyance of land, or rents and profits for the use and occupation of it, he must, to entitle him to rescind, offer to return what he has received, and demand back what he has paid; but if he has received nothing, he may rescind at once, by bringing an action for what he has paid, as for money obtained from him by fraud.—*Herbert v. Stanford*, 503.
14. The defendant asked leave to prove that the specific articles paid on the contract were not worth the stipulated price. It was not proposed to prove that any fraud or misrepresentation had been made concerning them, but simply that the party, with full opportunity of inspecting and judging, had voluntarily fixed the price he would give for them at more than they were worth. *Held*, that, had the articles been delivered without a stipulated price, or had there been fraud or warranty, the evidence offered might have been proper; but as, in the absence of these, the parties had agreed upon the value of the articles, less than the sum named in that agreement, could not be the proper measure of the value in this suit against the defrauding party. The evidence offered was properly rejected.—*Ibid*.
15. Complaint that W. and B., on, &c., put into the hands of F. 400 dollars, to buy hogs for them, at five dollars per hundred weight gross, if they could be had at that price, and if not, the defendant was to refund the money; that at the time he received the money, he executed a receipt, which was filed with the complaint; that the defendant never furnished or delivered to the plaintiffs any hogs, in performance of his undertaking, but excused himself from such performance by asserting that he could not buy hogs at the price stipulated, and on, &c., refunded 245 dollars, 50 cents, of said 400 dollars, leaving a balance of 154 dollars, 50 cents, which he refuses to refund, &c. Defendant, in his answer, says "he bought 145 dollars, 50 cents' worth of hogs for the plaintiffs, and had them ready to deliver, on his farm, &c., on, &c., at five dollars per hundred weight gross, in part performance of said contract, and still has them on said farm, ready to be delivered to the plaintiffs, and he offered so to deliver them on that day; but the plaintiffs refused to receive them; and, further, that the plaintiffs and defendant then and there, in consideration of the refunding of the balance of said 400 dollars, as alleged in the complaint, rescinded the contract so far as he was bound thereby to purchase the residue of said hogs—he, the defendant, having executed and performed that part of the contract which was not rescinded by agreement of the parties, by purchasing the hogs, now on his farm, for the plaintiffs." *Held*, that this defense is inaccurate in point of form; but as the Court explained it, it was sufficient.—*Francis v. Warren et al.*, 563.

See CUSTOM AND USAGE; DAMAGES, 7; FORWARDING GOODS; LEASE; LIMITATIONS, 3, 4; PARTNERSHIP, 1, 2; PLEADING, 1, 2.

### CONVEYANCE.

1. A conveyance executed with the intent to defraud creditors, is not rendered valid by the circumstance that it was executed upon an adequate consideration.—*Ruffing et al. v. Tilton et al.*, 259.
2. If a conveyance be made colorably with intent to defraud existing creditors, it may be avoided by subsequent creditors.—*Ibid*.

See DEED; HUSBAND AND WIFE, 15, 16, 17; INFANCY, 1.



CORPORATIONS.

1. Assumpsit by a railroad company on a subscription of stock. Trial upon the general issue. The plaintiffs proved by their secretary that certain books had come into his possession from his predecessor, as books of the company, one of which purported to contain subscriptions to their capital stock, and another, to contain their proceedings. Certain entries in these books were admitted in evidence. The subscription-book contained resolutions of the directors, fixing the amount of a share, the terms, &c. To these, the declaration averred that the defendant placed his signature, with the number of shares he desired. The resolutions were specially set forth in the declaration.

*Held*, first, that the proof of the identity of the instrument offered in evidence, with that declared on, was sufficient, if, indeed, such proof was at all necessary.

Second, that under the issue, proof of the execution of the instrument was not necessary.

Third, that under the decision in *Judah v. The American Live Stock Ins. Co.*, 4 Ind. R. 333, the admission of the extracts from the books of the company, was not error.—*Breedlove v. The Martinsville, &c., Railroad Co.*, 114.

2. The terms of payment contained in the resolutions subscribed were, that one dollar be paid in hand on each share, at the time of subscribing, and that 10 per cent. on each share be paid every sixty days after the work shall be put under contract. The work was put under contract in 1850; but there was no evidence that the defendant had notice of that fact, nor that any call had been made for the payment of installments, or payment demanded, though the declaration alleged such demand. *Held*, that such notice was not necessary.—*Ibid*.
3. An action for damages lies against a corporation for refusing to permit a transfer of stock.—*Helm, President, &c., v. Swiggett*, 194.
4. Perhaps a mandamus would lie.—*Ibid*.

See BANKS AND BANKING; EVIDENCE, 20; RAILROAD COMPANY; SUBSCRIPTION OF STOCK.

COSTS.

1. Where the demand proved by the plaintiff is reduced below 50 dollars by any defense other than payment, the defendant is liable to judgment for costs.—*Bates v. Kuhn*, 355.
2. In determining whether a recovery on appeal from a judgment of a justice of the peace is reduced five dollars or not, the sums recovered are the guide, without regard to interest upon the justice's judgment, or upon the claim sued on.—*Turner et al. v. Simpson*, 413.
3. Suit before a justice of the peace, upon a promissory note for the payment of 22 dollars. The justice gave judgment for the plaintiff, and the defendants appealed. In the Common Pleas, they moved to dismiss the cause, on the ground that the plaintiff had not, when he commenced his suit before the justice (he being a non-resident of the county in which it was commenced), given security for costs. Pending this motion, the plaintiff offered to give such security; but his offer was refused. The defendants' motion was sustained, and the cause dismissed, &c. The record, though it shows that the defendants appeared before the justice, and contested the plaintiff's suit, fails to show that they even suggested his non-residency. *Held*, that the defendants having appealed, the cause must be considered in the Common Pleas *de novo*, and the result is, that security for costs could not be required in that Court, unless the plaintiff was a non-resident of the state.—*Coffey v. Collier et al.*, 565.
4. If a defendant in a suit before a justice of the peace, appear and answer, and afterwards refuse to defend further, on the ground that he is not a resident of the county, letting his appearance stand, the justice must proceed with the cause; and if judgment be rendered against him, and he appeal and reduce the judgment five dollars or more, he will be re-



garded as having appeared in both Courts, and the costs in the appellate Court must go against the plaintiff.—*Holcomb v. McDonald*, 566.

See ERROR, 3; PARTIES, 7.

### COUNTER-CLAIM.

Where a counter-claim is pleaded, the jury may find for the defendant any excess over the amount proven by the plaintiff.—*Gordon v. George*, 408.

See SET-OFF.

### COURT-HOUSE.

The statute of 1843 authorized the Court of Probate to be held at the clerk's office, and declared that the place where the Court was held for the time being should be considered the court-house.—*Shull et al. v. Kennon et ux.*, 34.

### CRIMINAL LAW.

1. If an indictment is conveniently legible, it will not be held bad because it contains interlineations; and in the absence of anything appearing upon the face of a written instrument, or being shown extrinsically, tending to prove that interlineations were made subsequently to its execution, it will be presumed they were made before or at its execution.—*French v. The State*, 670.
2. In the absence of anything tending to show the contrary, if the record recite a jury of twelve lawful men, it will be presumed that the panel of jurors possessed the requisite qualifications.—*Ibid.*
3. For evidence deemed sufficient to sustain a verdict of guilty, on an indictment for murder, see the opinion, point 3.—*Ibid.*
4. The Court, in this case, gave the following instruction: "Evidence which tends to establish the defendant's guilt, also tends, in an equal degree, to prove that he was present at the time and place when and where the deed was committed; and, if he seeks to prove an *alibi*, he must do it by evidence which outweighs that given for the state, tending to fix his presence at the time and place of the crime." *Held*, that this was error; that if the evidence on behalf of the prisoner raises a reasonable doubt of the truth of the charge, he must be acquitted, and this doubt may arise from the whole of the evidence in the case; that the rule is in nowise different in a case where the defendant sets up an *alibi*, from what it is where other affirmative matter is relied on.—*Ibid.*

See CONFESSION OF GUILT; CONSTITUTIONAL LAW, 3; EVIDENCE, 1 to 4; JUSTICE OF THE PEACE, 2; SHERIFF, 6.

### CUSTOM AND USAGE.

- A. placed four hundred bushels of wheat in the mill of B., upon the terms that the latter might mix it with his own, convert it into flour when he pleased, sell the flour, and appropriate the proceeds to his own use, but that, whenever A. saw fit, he had a right to exact from B. the same quantity in kind of wheat, or the amount of flour so much wheat would make, or the then price of wheat per bushel, in money. It was claimed that it was a custom at *Indianapolis*, that when a miller received wheat upon the terms above stated, it was at the risk of the seller till he called for his pay. *Held*, that such a custom could only be proved by showing that the *Indianapolis* millers had long been in the habit of thus receiving wheat, and losing it, or having it destroyed, and that the sellers did not claim pay for it.—*Carlisle v. Wallace*, 252.



## D.

## DAMAGES.

1. A judgment will not be reversed for a failure to assess nominal damages.—*Patton v. Hamilton*, 256.
2. The party on whose behalf an assessment of damages is made, must tender the amount assessed before the right of entry can arise; and if it should be important that entry should be made before an appeal from the assessment can be disposed of, the party entering will not be precluded from further litigating the amount of damages by making such tender as would, under the constitutional provision, authorize him to enter. The tender should be the full amount of the assessment. The fact that it is accepted, will not change the rights of the parties.—*The Indianapolis, &c., Railroad Co. v. Brower*, 374.
3. An appeal lies from the decision of the Circuit Court in a proceeding for the assessment of damages.—*Piper et al. v. The Connersville, &c., Turnpike Co.*, 400.
4. The general law providing for appeals to the Supreme Court (2 R. S. p. 158, § 550), repealed the provision of the statute (1 R. S. p. 395, § 7) making the decision of the Circuit Court final in such cases.—*Ibid.*
5. The Court, in this case, by agreement of parties, ordered that three viewers should examine certain premises, and assess the damage occasioned by the construction of the road through them, and that if they should desire to hear evidence, they must notify the parties; and the parties acquiesced in the order. Two of the viewers did not desire to hear evidence; but made their report upon their examination of the premises.  
*Held*, first, that it could not be objected that the assessment was made without hearing evidence.  
 Second, that the viewers were not a jury; that by the agreement to an assessment by viewers, the right to a jury was waived; that the action of a majority of the viewers was sufficient.—*Ibid.*
6. In a suit upon an agreement to deliver a certain amount in cash notes, the value of the notes, as found by the jury, and not the amount stated in the agreement, is the measure of damages.—*Williams v. Jones et al.*, 561.
7. Where A. agreed with a surviving partner that if the latter would apply the assets of the firm to the payment of an individual debt of the deceased partner, he, A., would pay the debts of the firm, it was *held*, that a right of action would accrue upon the breach of the undertaking by A., and that the measure of damages would be the amount that was to have been paid by A.—*Weddle v. Stone*, 625.
8. A. built a mill and dam, and proceeded to obtain a writ of *ad quod damnum*. The jury found that the mill was of public utility, and that no injury would result from its erection, except to B., whose lands were overflowed and injured 50 dollars. B. appeared in the Circuit Court and filed nine pleas. The last five were—5th. That the damage to the lands was more than 50 dollars, to-wit, 500 dollars. 6th. That he (B.) was the owner of a mill, &c., above that of A., which was greatly injured, &c. 7th. That he was the owner of a certain spring, &c., which was greatly injured. 8th. That a mill privilege owned by B., on his land above said mill, was greatly injured over and above said assessment, to-wit, 500 dollars. 9th. That a flume, bulkhead, and race, owned by B., above said mill, was rendered valueless, to his injury 50 dollars, over the amount assessed, &c. Issue upon the 6th, 7th, and 8th pleas, and as to the 9th, reply that the race, bulkhead, &c., were, by said B., erected in bad faith, for the purpose of injuring, &c. Rejoinder by B. taking issue. Trial by jury; failure to agree. Several terms afterwards, B. moved to dismiss the proceeding. The record states that the Court, "after hearing the proofs and allegations of said defend-



ant in favor of said motion, and the proofs and allegations of the parties, both in support of and against said motion, issues, and traverses, made, joined, and tendered, as aforesaid, except as to the amount of damage assessed by the jury of inquest, on which subject evidence was introduced by both parties, but was not considered by the Court in deciding said motion, the Court found for the plaintiffs, and overruled said motion." Without further trial, the inquest was confirmed. Objections by *B.*, that he had no notice of the time of holding the inquest; that the form of the oath of the jury was wrong; and that the confirmation of the inquest was erroneous.

*Held*, first, that as *B.* appeared at the first term after the return and filing of the inquest, and did not make either of the first two objections, it is too late on appeal.

Second, that the issues of fact upon the question of damages, should have been disposed of before the Court should have made an order of confirmation.—*Wood v. Wilson et al.*, 637.

See CONTRACT, 14; NEW TRIAL, 2; PLEADING, 17; RAILROAD COMPANY, 7.

### DEDICATION.

1. To constitute a dedication, there should be a clear intention to devote the ground claimed to have been dedicated to the use of the public.—*The President, &c., v. The City of Indianapolis*, 620.

2. Square 50, in the town of *Indianapolis*, was dedicated to the public as a market space, by the action of the commissioners appointed to lay off said town pursuant to the act of 1821. (Acts of 1821, p. 44, § 4.) By an act of 1837, the south half of said square was exchanged for a part of the north half of square 48, and deeds in fee simple made. The deed to the town of *Indianapolis*, though it recites that it was given in consideration of the south half of square 50, does not express the purpose of the grant.

*Held*, that by the act of 1837, the part of square 48 was dedicated to the public in lieu of the half of square 50; and that act, being a public one, entered into and formed a part of the deed, and rendered a statement in the deed of the purpose of the grant unnecessary.

*Held*, also, that said part of square 48, having been so dedicated, it could not be sold on an execution against the corporation of *Indianapolis*.—*Ibid.*

### DEED.

1. A deed fair and valid upon its face, is evidence of an honest transaction; and, until it is assailed by evidence, effective as proof, that it was obtained by the fraud of the grantee, he is not required to adduce any evidence in its support.—*Ewing et al. v. Gray et al.*, 64.

2. *A.* purchased a tract of land at sheriff's sale, and subsequently conveyed it to the wife of *B.* *Held*, that, although the circumstances of the case may tend to induce the conclusion that *A.* purchased at the instance and with the money of *B.*, yet the conveyance to the wife must be held valid, unless she is shown to have participated in some way in the fraudulent conduct of *B.*—*Ibid.*

3. A deed cannot be avoided on the ground of mental incapacity in the grantor, produced by intemperance, unless it appear that at the time he executed the deed he was incompetent to perform the act.—*Johnson et ux. v. Rockwell et al.*, 76.

4. A deed by husband and wife, good in point of form, and properly acknowledged, and in its operative parts conveying a fee simple, is not vitiated by a concluding clause assuming to state the legal effect of the conveyance as to the wife—such clause being mere surplusage.—*Ibid.*

5. Evidence may be heard to show that there was no consideration for a deed.—*Andrews v. Andrews et al.*, 348.

6. A deed drawn by mistake for a different interest from that intended to be conveyed, may



be corrected, if the mistake be clearly proved. A deed of gift is no exception to the rule.—*Ibid.*

7. If a party, by such mistake, hold a greater estate than belongs to him, and convey it to an innocent purchaser, receiving the consideration, he may be treated as a trustee for the real owner.—*Ibid.*

See DEDICATION, 2; EVIDENCE, 16, 17; PARTIES, 6.

#### DEFAULT.

See JUDGMENT BY DEFAULT.

#### DELIVERY-BOND.

1. If a complaint upon a delivery-bond refers to the debt, interest, and costs, shown by the execution, as the amount demanded in the suit, and it appears by such reference that the amount is within the jurisdiction, it is, in this respect, sufficient.—*Paul et al. v. Arnold*, 197.
2. The statute (2 R. S. pp. 138, 139, §§ 457, 458), contemplates the insertion in a delivery-bond of a stipulation that the execution-defendant may dispose of the property; but as the stipulation is for his benefit, if he execute the instrument without inserting it, it will be presumed that he waived it, and the bond will be valid without it.—*Ibid.*

#### DEMAND.

See PLEDGE, 3.

#### DEPARTURE.

See PLEADING, 5, 6.

#### DEPOSITIONS.

See *Morgan v. Montgomery*, 550.

#### DEPUTY.

See SHERIFF, 5.

#### DESCENTS.

See HUSBAND AND WIFE, 10.

#### DISCONTINUANCE.

Under the statute of 1843, a cause was not discontinued by a failure of the clerk to enter continuances, though such entries, when made, were a part of the record, as were the entries of the filing of papers.—*Shull et al. v. Kennon et ux.*, 34.

*How Waived.*]

See PRACTICE, 14.

#### DISCRETION.

See JUDGMENT BY DEFAULT, 3; PARTIES, 3, 6; VENUE, 2.

#### DISMISSAL.

See PRACTICE, 15.



## INDEX.

## DIVORCE.

See JUDGMENT, 5.

## DOWER.

1. A dower interest in the real estate of her deceased husband accruing to the widow by virtue of the marriage is assignable.—*Strong v. Clem*, 37.
2. The right of the widow being equitably assignable, may be enforced, under the code, in the name of the assignee.—*Ibid*.
3. *Strong v. Bragg*, 7 Blackf. 62, though correctly decided as a case at law, was incorrectly decided as a case in chancery.—*Ibid*.
4. Where a husband, before the 6th of May, 1853, owned land and conveyed it in fee simple, his wife not joining in the deed, and after the taking effect, upon that day, of the statute abolishing dower and substituting a fee simple, the husband died, the wife cannot take either dower or one-third in fee.—*Ibid*.
5. So far as the statute of 1853 provides that one-third in fee of land so conveyed and vested in the purchaser, shall be divested out of him and vested in the widow of the deceased grantor, it is unconstitutional and void.—*Ibid*.
6. Notwithstanding the statute purports to abolish existing tenancies by the curtesy and in dower already in enjoyment, it can only be held to take away inchoate rights.—*Ibid*.

See *Logan v. Walton*, 639; *SALE*, 5.

## E.

## EJECTMENT.

A recovery in an action for trespass commenced before a justice of the peace, and upon the title of the land being put in issue, removed to a Court having jurisdiction—no judgment having been rendered touching such title further than it might be supposed to enter into the determination of the action of trespass, and no determination of that issue having been necessary to enable the Court to render the judgment—is no bar to an action of ejectment.—*Hargus v. Goodman et al.*, 629.

See CHANCERY, 2; LIMITATIONS, 6, 7.

## ELECTION.

See WAGER.

## ERROR.

1. An assignment of error in this—that judgment was rendered for the appellee when it ought to have been rendered for the appellant—amounts to nothing.—*Ruffing et al. v. Tilton et al.*, 259.
2. Assignment of error thus, “The judgment should have been for *Galletley*, and not for *Barrackman*.” Held, bad.—*Galletley v. Barrackman*, 379.
3. Where erroneous instructions of the Court to the jury upon the trial of a cause, constitute the error for which the judgment in the cause is reversed by the Supreme Court, such error will, as a general rule, render the whole trial an error, so far as to compel a reversal back through the trial to the issue. It renders a second trial of the issue necessary. Such was this case; and the reversal carried the costs of the erroneous trial had, by the express terms of the decision in 8 Ind. B. 396.—*Doyle v. Kiser*, 474.
4. There may, perhaps, be cases of an equitable nature, where a reversal may extend through



a part, and not the whole, of a trial, even for erroneous instruction; but this is not one of them.—*Ibid.*

EVIDENCE.

1. As a general rule, evidence should not be given, either in criminal or civil cases, which does not directly tend to the proof or disproof of the matter in issue.—*Lovell v. The State*, 18.
2. Under this rule, the facts given to the jury in a criminal case should consist exclusively of the transaction which forms the subject of the indictment.—*Ibid.*
3. Hence, the prosecution cannot prove another distinct offense for the purpose of raising an inference that the accused is guilty of the offense charged.—*Ibid.*
4. Thus, where the indictment contained a single charge of incest, which was proved as laid, the state cannot prove that the defendant had sexual intercourse with the prosecuting witness at any subsequent time.—*Ibid.*
5. A document of another state not admissible in evidence by the common law, will be rejected where the statute of the foreign state is not produced, though such a document of this state is admissible by our statute.—*Johnson et al. v. Chambers et al.*, 102.
6. The Courts cannot take notice of the statutes of a foreign state changing the common law.—*Ibid.*
7. Upon the trial of this cause, it appeared that a written contract which was set up in defense had been altered; but both the parties conceded the alteration, and the questions of value and damages were examined and decided upon it as originally executed. *Held*, that evidence touching conversations as to who had made the alteration was irrelevant.—*Jones v. Julian*, 274.
8. Where a defendant pleads a set-off, the plaintiff may, without waiting for evidence in support of it, prove, in the first instance, that it had been settled by an arbitration between himself and the defendant; but, after having gone into such proof, he will not be allowed, at the close of the defendant's evidence, to give additional proof of such settlement.—*Williams v. Devitt*, 309.
9. A witness having stated his recollection of the facts, must not state his understanding and belief from such facts.—*Ibid.*
10. Where it appears that the items of an account, claimed to be settled by arbitration, were reduced to writing, parol evidence of its contents is not admissible until some valid reason is shown for the failure to produce the writing.—*Ibid.*
11. In general, a party may offer his evidence in the order he pleases; but where a previous fact is necessary to be proved, to render the evidence at all relevant, the Court may require proof of such fact as a condition of the admission of the evidence.—*Nordyke et al. v. Shearon et al.*, 346.
12. In a suit upon an attachment-bond, the plaintiff, to prove that the attachment was wrongfully obtained, offered in evidence the record of the suit in which it had been obtained, and in which judgment had been rendered against the party obtaining it; but the Court rejected the record because it had not been filed with the complaint. *Held*, that this was error.—*Draper et al. v. Vanhorn et al.*, 352.
13. In a suit upon an attachment-bond, a contract incidentally involved as an extrinsic fact proper to be proved in the trial of an issue, may be proved by parol, if shown to be destroyed.—*Ibid.*
14. In a suit against a constable and his sureties, upon his official bond, an execution, legal on its face, set out in, and constituting a material portion of, the complaint, is admissible in evidence.—*The State ex rel. Frisbie v. Hart et al.*, 424.



15. Entries in a hymn book, proved to be in the handwriting of a parent, or made by direction of a parent, *ante litem motam*, in the form of a family record, are admissible in evidence to prove the age of a child, where the father and mother are dead, and the child has no near relative in the state.—*Collins v. Grantham*, 440.
  16. Every man being presumed to be sane until the contrary appears, the rejection of evidence tending to prove the sanity of the grantor in a deed, where no evidence has been introduced to prove him insane, is not error.—*Dearmond et al. v. Dearmond et al.*, 455.
  17. Where a complaint to set aside a deed was not grounded on the incapacity of the grantor, but on the non-delivery of the instrument, testimony of incapacity was held to be irrelevant.—*Ibid.*
  18. Testimony sought to be evoked on cross-examination, which is not germane to any matter testified to on the examination in chief, and not pertinent to the issue, must be ruled out.—*Ibid.*
  19. If a party wishes to examine a witness of the opposite party touching a matter not testified to upon his examination in chief, he must make the witness his own.—*Ibid.*
  20. Where it is not in conflict with some provision of the charter, the acts of the directors of a corporation may be proved by parol.—*Langsdale v. Bonton*, 467.
  21. Parol evidence is not admissible, in the first instance, to prove the receipt of a judgment. If the receipt be upon the record, the record, or a transcript of it, must be produced. If it be upon a separate paper, and delivered to the opposite party in the suit, notice must be given to him to produce it on the trial, and upon his failure to do so, the contents of it may be proved by parol.—*Williams v. Jones et al.*, 561.
- See ARBITRATION AND AWARD, 12; BILLS OF EXCHANGE, 1, 2, 3; CONFESSION OF GUILT; CONTRACT, 9, 14; CORPORATIONS, 1; CUSTOM AND USAGE; NEW TRIAL, 9; PRACTICE, 19; RECOGNIZANCE, 4, 5; SEDUCTION; SUBSCRIPTION OF STOCK, 1; WAGES, 5; WITNESS.

## EXCEPTIONS.

1. Where there were two plaintiffs, and the record stated that the "plaintiff" excepted, it was held that the exception was good—the omission of the final s being a clerical error.—*Le-masters et ux. v. Johnson*, 385.
2. Where the parties in an action on appeal from a justice's Court, agreed that several causes might be tried together in the Circuit Court, and one general verdict might be rendered, with a stipulation that if the amount recovered was less, by 25 dollars, than the recovery before the justice, the plaintiff was to pay costs in the Circuit Court:—*Held*, that an exception to the overruling of a motion to consolidate the actions, was waived.—*Turner et al. v. Simpson*, 413.

See BILL OF EXCEPTIONS; PARTIES, 4; PRACTICE, 6, 16;

## EXECUTION.

1. Choses in action in the hands of a third person belonging to a judgment-debtor, may be subjected to the payment of the judgment, upon "proceedings supplementary to execution," under 2 R. S. p. 152, instituted by the judgment-plaintiff; but other creditors of such debtor have no right to make themselves parties to such proceedings, and demand a *pro rata* distribution of the proceeds of such choses in action.—*Butler et al. v. Jaffray et al.*, 504.
2. *Quere*, whether the word property, as used in the statute touching proceedings supplementary to execution (2 R. S. p. 152, § 518), includes only such lands, goods, &c., as are subject to execution in the first instance.—*Brisco v. Askey*, 666.



3. To extend this extraordinary remedy so as to include certain other means, the provisions of § 522 of the same statute must be complied with.—*Ibid.*
4. After the proper steps have been taken in this respect, the Court should not order accounts to be sold on execution, but should order the defendant not to transfer them; and if the persons against whom the accounts exist, are parties, the order may forbid payment, or require payment on the judgment of the plaintiff.—*Ibid.*

See CHANCERY, 3; DELIVERY-BOND; HUSBAND AND WIFE, 12, 13, 15, 16;  
JURISDICTION, 4.

### EXECUTORS AND ADMINISTRATORS.

1. Accounts for boarding, clothing, and educating the children of an intestate after his death, are not demands against his estate, and his administrator has no right to pay them.—*Sorin v. Olinger*, 29.
2. But where the intestate, in his lifetime, took the promissory note of *A.* for a large sum of money, at the same time entering into a parol agreement with *A.* that the latter should board, lodge, and educate certain of his children at an institution of learning of which *A.* was president and general agent, and that *A.*'s accounts therefor should be applied in payment of the note; and the boarding, lodging, &c., were furnished, during the life of the intestate, both before and after the maturity of the note, and continued to be furnished, pursuant to and in reliance upon the agreement, after his death; and after the death of the intestate, the accounts were presented to his administrator, and by him settled and allowed to go in payment of the note: *Held*, that the agreement was valid, and had it been fully executed at the maturity of the note, it would have constituted a bar to an action upon it. *Held*, further, that, as the intestate before his death permitted *A.* to continue to furnish to the children of the intestate, the board, &c., after the note matured, thereby assenting that he should proceed to board and educate them, as originally agreed, in payment of the note; and as the administrator not only suffered him so to proceed, but allowed his accounts as a proper credit on the note,—*A.*, as defendant in a suit upon the note, brought by the administrator *de bonis non*, should be allowed to stand as he would have stood had his entire demand, as allowed by the administrator, accrued before the intestate's death.—*Ibid.*
3. *Quere*, whether those interested in the estate might sue the administrator on his bond.—*Ibid.*
4. An administrator is a trustee of the real as well as the personal estate of his decedent; and as such, he cannot purchase such real estate at a sheriff's sale, for himself or for another, even though it be sold on an execution in his favor, levied before he assumed the trust, and although it may appear that he used efforts to make the property sell for the best price possible.—*Martin v. Wyncoop et al.*, 266.
5. And the *cestui que trust* may have such a sale set aside, without showing fraud, or that the administrator made no advantageous bargain.—*Ibid.*
6. If, by mistake, an item chargeable against an administrator, be not litigated or examined in a suit upon his bond, and not embraced in the judgment, it may be recovered in another on the bond.—*The State ex rel. Richardville v. Brutch*, 381.
7. Complaint by an administrator for rents due for certain real estate of his decedent, accrued after his death, averring generally that the plaintiff had authority to, and did, rent the property. *Held*, that in view of the statute (2 R. S. p. 273), and the principle that the tenant cannot dispute his landlord's title, the complaint was sufficient without showing that the heirs, &c., were not present.—*Guyann v. Jones*, 486.
8. It is no breach of the condition of an executor's bond that he neglected to inventory and



sell the goods of his testator, unless they have come to his knowledge.—*The State ex rel. Leach v. Scott et al.*, 529.

9. For an executor to convert any portion of the testator's property to his own use, is a breach of the condition of his bond.—*Ibid.*
10. Where one, only, of several breaches of the condition of such bond is well assigned in a complaint thereon, a general demurrer thereto should be overruled.—*Ibid.*
11. A complaint under oath, charging an administrator with having failed to make out and return proper inventories and sale bills, as required by § 34, 2 R. S. p. 255, and § 45, *id.* p. 257, is sufficient to authorize the removal of the defendant for neglect of his duty as such administrator, under the provisions of § 22, 2 R. S. p. 252.—*Pace v. Oppenheim et al.*, 533.
12. An inventory and appraisement under the provisions of 2 R. S. p. 279, in regard to the "disposition of estates not worth over 300 dollars," do not dispense with the necessity of making an inventory and appraisement by an administrator subsequently appointed.—*Ibid.*
13. An inventory and appraisement made under the statute in relation to the "disposition of estates not worth over 300 dollars," is not conclusive on the question of the value of the property.—*Ibid.*
14. The widow of the decedent in such case, is sufficiently interested in the estate to entitle her to maintain a suit to remove the administrator for failing to make and return an inventory.—*Ibid.*

See PARTIES, 5.

#### EXEMPTION.

*From Execution.*]

See HUSBAND AND WIFE, 12, 13, 14.

#### EXPERTS.

See WITNESS, 4, 5.

#### F.

#### FAMILY RECORD.

See EVIDENCE, 15.

#### FENCES.

See RAILROAD COMPANY, 1 to 6.

#### FORMER CONVICTION.

*When a Nullity.*]

See JUSTICE OF THE PEACE, 2.

#### FORMER RECOVERY.

*When no Bar.*]

See EJECTMENT.

#### FORWARDING GOODS.

Where goods were ordered to be forwarded by the first boat leaving *P.* for the *Wabash*, it was held, that the direction meant no more than that they should be forwarded at the earliest opportunity.—*Johnson et al. v. Chambers et al.*, 102.

#### FRAUD.

See CONTRACT, 9, 10, 11; CONVEYANCE; DEED, 1, 2; HUSBAND AND WIFE, 3, 4, 13, 14; JUDGMENT, 3.



## FRAUDULENT CONVEYANCE.

See PARTIES, 2.

## G.

## GUARDIAN AND WARD.

*P.* who had, by proceedings under the statute, adopted an infant as his son, filed a petition to remove *B.*, who had been appointed guardian of said infant. The reasons alleged were, that *B.* had failed to discharge his duty as such guardian, in this, that he had not, within three months after his appointment made an inventory and report of the amount or the estate of his ward; nor had he loaned the same at interest, as was his duty; nor did he, in his report, account for interest upon said estate. The amount of the estate is shown. The guardian was appointed October 30, 1854. The inventory, &c., was filed January 12, 1856. The letters of guardianship were revoked. Neither the removal, nor the application therefor, was made until after the report was made and approved by the Court. *Held*, that if the time had then past within which it was the duty of the Court to make the removal, still the failure of the guardian in his duty, in that respect, was a circumstance to be taken into consideration, in connection with the use of the estate without accounting for interest, upon the question of removal.—*Barnes v. Powers*, 341.

See INFANCY, 2; PRACTICE, 23.

## H.

## HIGHWAYS.

1. The board of commissioners of a county, under the provisions of 1 R. S. pp. 310, 313, 316, §§ 15, 27, and 46, have no jurisdiction of a petition for a new road, unless it be shown affirmatively therein that the proposed highway will run "into more than one township."—*Daggy et al. v. Green et al.*, 303.
2. A report made by viewers of a proposed highway, who own land along the same, is a nullity.—*Ibid*.
3. In an action to recover damages for obstructing a highway, it is no defense that the plaintiff is guilty of obstructing it on his own land.—*Langedale v. Bonton*, 467.

See STREETS.

## HUSBAND AND WIFE.

1. The wife is not bound by the acts and declarations of her husband unless she had knowledge of them.—*Ewing et al. v. Gray et al.*, 64.
2. Where the wife receives money during coverture, which is left under her control and management by the husband, and which they both treat as her separate property, the jury may, from these circumstances, find that she was the sole owner of it.—*Ibid*.
3. Where a wife, with money belonging in part to herself, and in part to her husband, for the purpose of delaying and defrauding his creditors, causes his lands to be bought in at sheriff's sale, and afterwards conveyed to herself, her title, thus acquired, is fraudulent and void as to such creditors.—*Ibid*.
4. The question of fraudulent intent in such cases is one of fact; but here the legal effect of an instrument, as it appears on its face, is to hinder or delay creditors, the Court will, in the first instance, pronounce it void.—*Ibid*.
5. If a wife, by an antenuptial contract, secure to her separate use the property possessed by her at the time of her marriage, and have the same conveyed to a trustee, subject to her



- unlimited control; and, after marriage, she exchange a portion of that property for real estate, taking a conveyance to herself, separately—such real estate becomes her separate property, alike subject to her control, at least in equity, as was the property given in exchange for it.—*Johnson et ux. v. Rockwell et al.*, 76.
6. A wife may, with the consent of her husband, convey her separate real property.—*Ibid.*
  7. In transactions between husband and wife touching the separate estate of the latter, she, *prima facie*, will be viewed in the light of a *feme sole*; and as such, she may dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part; and such disposal of it will preclude her right to charge his estate, after his death, with what he so received. The conveyance, in such case, must be made through a third person.—*Ibid.*
  8. Where a *feme sole*, being the payee of a promissory note, married prior to the statute of 1853 (Acts, p. 57), *held*, that the husband acquired a property in the note, and he, alone, could pass it by indorsement; and he could sue upon it without joining his wife.—*Holland et al. v. Moody*, 170.
  9. The husband's right to the note, in such case, vested at the time of the enactment of the statute, was not affected thereby.—*Ibid.*
  10. If a *feme covert*, owning real estate, die intestate without issue, and without a surviving parent or parents, but leaving her husband surviving her, the entire estate descends to the husband.—*Shaw v. Breese*, 392.
  11. *C.* married a wife. There was a debt of record existing against her at marriage, being the consideration of a piece of land in the possession of the wife, and enjoyed by the husband jointly with her. This debt the husband paid by selling to the creditor another piece of land of the wife. The sale was with the consent of the wife, and was evidenced by a written instrument executed by the husband. The wife died before making a deed. Her heirs refused to execute the deed. The creditor sued the husband. He recovered. *Held*, that he was entitled to his election, either to treat it as a claim against the husband, sue him, and recover it, leaving him to go back upon the estate of the wife descended to the heirs; or to thus resort, himself, to that estate.—*Crawford v. Verry*, 427.
  12. A resident householder cannot claim land as exempt from sale upon execution, the title to which is in his wife.—*Holman v. Martin*, 553.
  13. Nor can he avail himself of his own fraud in having the land conveyed to her, to enable him to set up such exemption.—*Ibid.*
  14. The question of the validity of the conveyance to the wife, arises between her and the creditors of the husband; and the question being one of fact, it would be for a jury, or the Court sitting as a jury, to determine it; and a verdict, in such cases, if not clearly wrong, will not be disturbed by this Court.—*Ibid.*
  15. At common law, a husband became entitled by marriage to an estate in the lands of his wife during their joint lives; and such estate was as absolute during that period, as if acquired by conveyance or in any other mode; and it was subject to sale on execution against him, and might be conveyed by him.—*Montgomery v. Tate*, 615.
  16. The statute of 1838 did not change the law in this respect.—*Ibid.*
  17. The death of the husband leaving the wife surviving, would, *it seems*, terminate such an estate conveyed by a sheriff; but the deed would be good for whatever interest the husband had, for the lifetime of the wife.—*Ibid.*

See DEED, 2, 4; DOWER.

## I.

### INDIANAPOLIS.

See DEDICATION, 2.



INDICTMENT.

See CRIMINAL LAW, 1.

INFANCY.

1. The conveyance of real property by an infant is not void—it is only voidable; and where the contract for the conveyance is with an adult, such adult is bound, and cannot avoid the contract on account of the infancy of the other contracting party.—*Johnson et ux. v. Rockwell et al.*, 76.
2. Where the record contained nothing which would seem to empower a guardian to admit a case against his infant ward, a decree founded upon such an admission will not be sustained.—*McEndree et al. v. McEndree*, 97.
3. A decree against an infant will not be reversed simply because the evidence is not in the record.—*Ibid.*

See PARTITION, 1.

INFORMATION.

1. An information is not bad for charging the time when an offense is alleged to have been committed, in figures.—*Hizer v. The State*, 330.
2. An information is not bad for being signed by the district attorney with the official title of "prosecuting attorney," instead of "district attorney."—*Baldwin v. The State*, 383.

INJUNCTION.

An encroachment upon a street by fencing in a part of it is a public nuisance which a Court of chancery might, *it seems*, have restrained by injunction.—*Langsdale v. Bonton*, 467.

See JURISDICTION, 2; RAILROAD COMPANY, 7.

INSTRUCTIONS.

1. An instruction should be based upon a state of facts assumed to have been proved by all the evidence in the case bearing upon it, and not by a part thereof only; and this rule is especially applicable to cases involving the question of fraudulent intent, which is generally a question of fact.—*Ewing et al. v. Gray et al.*, 64.
2. If under any supposable state of the evidence, instructions given would have been correct, it will be presumed, the record not showing the contrary, that such evidence did exist.—*Ruffing et al. v. Tilton et al.*, 259.
3. In the absence of the evidence it will be presumed that the action of the Court, in refusing instructions, was correct.—*Ibid.*
4. If the evidence be not in the record, instructions given will be regarded as pertinent to the case made, unless clearly erroneous under any supposable state of facts; and instructions refused will, in that state of the record, be presumed to have been irrelevant.—*Newton et al. v. Newton*, 527.
5. A request on behalf of either party to have general instructions reduced to writing, should be made in time to enable the Court conveniently to perform that duty. It is too late when the Court is proceeding to give an oral charge.—*Ibid.*

See JURY, 2; VERDICT, 5.

INTEREST.

1. The statute upon interest does not render the contract upon which an illegal rate of interest is reserved, wholly void, but simply avoids it so far as it reserves illegal interest.—*Hays v. Miller*, 187.



2. Thus, if illegal interest be given by an award, a defense, in a suit upon the award, seeking to annul the entire award for that reason, is bad. To bring such a defense within the statute, the amount of interest included in the award, should be stated in the pleading.—*Ibid.*

#### INTERLINEATIONS.

See CRIMINAL LAW, 1.

#### INTERROGATORIES.

1. *A.* brought suit against *B.*, who filed an answer with interrogatories, which, without an affidavit of their materiality, he required the plaintiff to answer. The Court granted a rule upon *A.* for an answer to the interrogatories. *C.*, the attorney of *A.*, filed an affidavit that his client lived four miles from the Court, and knew nothing of the interrogatories; and upon this affidavit moved the Court to discharge the rule. *B.* at the same time moved for an attachment against *A.* for failing to answer the interrogatories. The Court discharged the rule, and refused the attachment.

*Held*, that this ruling was, under the circumstances, correct, with reference to the provisions of the act of 1855, p. 59.—*Cleveland et al. v. Hughes*, 512.

2. Under the statute (Acts of 1855, p. 59), if the plaintiff be absent at the calling of the cause, and fail to answer interrogatories, it is no cause for a continuance, without the affidavit prescribed by the same statute.—*Boswell et al. v. Travis*, 524.

See VERDICT, 5.

#### ISSUE.

See JURY, 1; PLEADING, 2, 4.

#### J.

#### JUDGMENT.

1. Complaint alleging the following facts, in substance, viz.: That *S.* mortgaged to *B.* three tracts of land in *Marshall* county; that afterwards, *S.*, with the consent of *B.*, sold two of them, and the proceeds were applied on the debt secured by the mortgage, and *B.* released to the purchaser the lands thus sold, from the mortgage; that afterwards *B.* filed his bill to foreclose the mortgage in the *Marshall* Common Pleas, in which action *D.* appeared as the attorney of *S.*, and the facts, as to the release of the two tracts of land, appearing to the Court by the admissions of *D.* as counsel, a decree of foreclosure was ordered as to the remaining tract not thus released, for the balance due on the mortgage, and a memorandum was furnished the clerk, of the remaining tract thus ordered by the Court to be sold, but, by some mistake of the clerk, the decree was entered for the sale of all the land mentioned in the mortgage; that an execution issued on the judgment of foreclosure, on which *D.* became replevin-bail, whereupon the execution was returned; that upon the expiration of the stay thus taken, another execution issued, and on the day when the property was offered for sale, *B.*, for the first time, discovered that the decree had been erroneously entered, and by his direction, only the remaining tract of land, not thus released by the mortgage, was sold; that after selling the last-mentioned tract, there remains a balance due on the judgment; that afterwards the plaintiff purchased the judgment from *B.*, and took a written assignment thereof, a copy of which is set out; that, at the time of purchasing the judgment, the plaintiff had no notice whatever of the error or mistake in the entering thereof; that *D.*, at the time he became replevin-bail, had full knowledge of the release of the two tracts of land, &c., and that the Court only ordered the remaining tract to be sold, and of the mis-



take of the clerk in entering the judgment. Prayer, that the mistake be corrected in the entry of judgment, so as to make it conform to the order of the Court, and that the executions issued thereon be also corrected, and for other relief. *S.* made default. *B.* appeared and answered, admitting the transfer of the judgment to the plaintiff, as alleged in the complaint. *D.* demurred, assigning for cause, that the complaint did not state facts sufficient, &c., and that there was a defect of parties plaintiff. The demurrer was sustained by the Court, and the plaintiff excepted. Final judgment for the defendants.

*Held*, that the Court erred in sustaining the demurrer to the complaint; that on the facts set up, the plaintiff was entitled to have the judgment and executions amended, in order that upon exhausting the property not thus released from the mortgage, he could proceed against the other property of the defendant, or, if need be, against that of the replevin bail; the replevin bail is shown to have been fully cognizant of the fact that the two pieces of land had been released from the mortgage, and the order of the Court in the premises, and it is but equitable that the amendment should be made as against him, as well as against *S.*, the judgment-debtor; that all Courts possess inherent power to correct clerical mistakes in their proceedings; that this was a mere clerical error which should have been amended; that the action is well brought in the name of the plaintiff; that by the assignment of the judgment to him, as averred, he became the real party in interest, and as such, was entitled to sue under § 3 of the code; that perhaps the legal title to the judgment did not, by the assignment, pass to the plaintiff, so as to prevent a subsequent transfer to an innocent purchaser, or so as to affect the validity of a payment to *B.*, the judgment-creditor, for the reason that the assignment was not on, or attached to, the entry of the judgment, nor attested by the clerk, as is provided for by the statute; but the assignment to the plaintiff vested in him the equitable interest in the judgment, and authorized the suit in his own name.—*Burson v. Blair et al.*, 371.

2. In an action brought to enforce a vendor's lien, upon a note given for the purchase-money of real property, a judgment directing the sale thereof, in the first instance, is erroneous, unless it appear from the record that the defendant had no personal property subject to execution out of which the judgment might be satisfied.—*Scott v. Crawford*, 410.
3. *Quære*, whether the code provides a substitute for the general common-law mode of setting aside a judgment or decree for fraud, where both parties appeared.—*Woolley v. Woolley*, 663.
4. Under § 99, 2 R. S. p. 48, a judgment or decree could not be set aside one day after the expiration of one year.—*Ibid*.
5. *It seems*, that the common-law practice will not be revived to supply an omitted case, upon an application to set aside a decree for divorce and alimony; because the code has special provisions for the case, and it is not in accordance with the usages, the practice, or the legislation, in this state, to disturb judgments of divorce for any cause.—*Ibid*.

See CHANCERY, 1; DAMAGES, 1; JUDGMENT BY CONFESSION; JURISDICTION, 3, 4; PARTIES 4; PRACTICE, 13.

Receipt of.]

See EVIDENCE, 21.

#### JUDGMENT BY CONFESSION.

A judgment was confessed upon a complaint, note, and warrant of attorney. The appearance and confession were by an attorney. No affidavit of the party confessing, accompanied, and was filed with, the warrant of attorney. *Held*, that the proceeding was erroneous.—*Aldrich v. Minard*, 551.

See JURISDICTION, 3; MISTAKE.



## JUDGMENT BY DEFAULT.

1. At common law, a default could not be set aside at a term after the one at which judgment was rendered.—*Carlisle v. Wilkinson et ux.*, 91.
2. By § 99, 2 R. S. p. 48, it is discretionary with the Court to relieve a party from a judgment by default, or refuse to do so, at any time within a year from the rendition of the judgment.—*Ibid.*
3. Where a discretionary power is vested in an inferior Court, there must be a plain case of abuse of that discretion, to justify interference by the Supreme Court.—*Ibid.*
4. An application for relief from such a judgment, made at the first term after a default, and based solely upon the affidavit of the defendant, simply showing the employment of an attorney and his neglect to defend, was *held* to have been correctly overruled.—*Ibid.*
5. And a second application, made at the next succeeding term, based upon the first affidavit and an affidavit of the attorney that he did not understand that he was employed, although the defendant might have understood that he was employed, was *held* to have been correctly overruled, for the reason that the affidavit of the attorney came too late—that ordinary diligence required that it should have been filed at the preceding term.—*Ibid.*
6. *Quære*, whether, if both affidavits had been filed on the first application, it would have been error to overrule it; and whether an application can, in any case, be renewed upon an additional showing, after having been once made and overruled.—*Ibid.*
7. The neglect of an attorney employed to defend a suit, is the neglect of the party employing him; and a party will not be entitled to relief from a judgment by default, on account of such neglect, unless it be shown to have been excusable.—*Spaulding et al. v. Thompson et al.*, 477.
8. An appeal will not lie from an order setting aside a default and judgment.—*Ibid.*
9. Judgment by default. The only error complained of, was, as to the sufficiency of the service. The writ was returned "served by reading" as to two of the defendants, and "by copy," as to the other. *Held*, that if there was any defect as to the service or return, a motion should have been made in the Court below to set aside the default.—*Adams et al. v. Brown et al.*, 558.

## JUDICIARY.

See *Waldo v. Wallace*, 569.

## JURISDICTION.

1. Where several mortgagees are brought before the Court, each having a separate claim against the mortgagor, which, of itself, is within the jurisdiction of the Court, but the aggregate of all of which claims amounts to a sum beyond that jurisdiction, the jurisdiction of the Court is not ousted.—*Mack et al. v. Grover*, 254.
2. The Court of Common Pleas cannot, under the statute, try an issue involving the title to real estate, arising upon an application for an injunction.—*The President, &c., of Lamasco v. Brinkmeyer*, 349.
3. The Circuit Courts have exclusive, original jurisdiction in all cases of "one thousand dollars or upwards;" and such exclusive jurisdiction in the Circuit Courts extended to confessed judgments as well as others.—*Marsh et al. v. Sherman*, 358.
4. The Court of Common Pleas not having jurisdiction of the subject-matter in point of amount, its judgment is a nullity, and no title is acquired by the purchaser upon the sale under it. The execution is void on its face, showing that it was issued upon a judgment rendered by a Court having no jurisdiction to render such judgment, and is notice to all the world, and especially to the execution-plaintiff, of its invalidity.—*Ibid.*



5. To a suit on a promissory note commenced in the Court of Common Pleas, an answer that the note was given for a tract of land to which the plaintiff fraudulently represented he had the fee simple title, when in fact the fee simple title was in a third person, does not oust the Court of jurisdiction.—*Harvey v. Dakin*, 481.

See CONSTITUTIONAL LAW; DELIVERY-BOND, 1.

### JURY.

1. After the jury are sworn, and have heard a part of the evidence, a new issue should not be tendered without cause shown; and if the issues are permitted to be changed, the jury must be re-sworn.—*Kerschbaugher v. Slusser*, 453.
2. After the jury had retired to their room to consult of their verdict, they sent to the judge information that they desired instructions upon a point. Instead of calling the jury back to the Court-room, and instructing them in the presence of the parties, the judge went into their room and gave them instructions in the absence of the parties, and without their consent. *Held*, that this is a practice not to be tolerated.—*Fish et al. v. Smith*, 563.

See CRIMINAL LAW, 2; HUSBAND AND WIFE, 14; VERDICT.

When Waived.]

See DAMAGES, 5.

### JUSTICE OF THE PEACE.

1. Where a statute confers a new power upon a justice of the peace, he must follow the statute strictly.—*O'Brian v. The State*, 369.
2. Where an offense is committed within the view of a justice of the peace, he can do no more, under the statute, than direct the arrest of the offender, and have him kept in custody for one hour, unless sooner taken from custody by a warrant issued on complaint under oath. He cannot try the prisoner until he is charged by such complaint; and if he try and convict him, the conviction is a nullity, and is no defense upon a trial for the same offense in the Common Pleas.—*Ibid*.

See LOTTERY, 1; PLEADING, 12.

### L.

### LANDLORD AND TENANT.

See EXECUTORS AND ADMINISTRATORS, 7.

### LAPSE OF TIME.

See LIMITATIONS; MISTAKE.

### LEASE.

Where one person takes a lease of lands of another, and thereby becomes bound to perform certain stipulations, and afterwards assigns the lease before entry, his assignee becomes liable to the performance of such stipulations. Such liability arises not from priority of contract between the lessor and assignee, but from priority of estate.—*Gordon v. George*, 408.

### LEVY.

See BILLS OF EXCHANGE, 4.

### LIEN.

The Probate Court, upon application by the administrator, was authorized by the R. S. 1843,



pp. 531, 532, §§ 245, 251, to order a sale of the decedent's real estate to discharge liens thereon; and after such sale, the payment of the purchase-money, and the application thereof to the discharge of such liens in the order of their priority until it was exhausted, a junior incumbrancer whose lien was still unpaid, could not enforce it against the real estate so sold, in the hands of the purchaser.—*West et al. v. Townsend et al.*, 434.

#### LIMITATIONS.

1. Where the items of an account are all on one side—there being none on the other side except credits of payment—the account is not mutual, open, and current, within the meaning of the statute of limitations.—*Prenatt v. Runyon*, 174.
2. To take a case out of the statute of limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought; and the amount of that debt must be shown to be greater than the sum paid.—*Ibid.*
3. Order in writing as follows: "*Vernon, July 14, 1850. Mr. F. Prenatt—Sir: I want you to send me two barrels of whisky, as soon as possible, and I will be down this week and pay you for the same,*" &c. "*Yours, Israel Runyon.*" Held, that the six years' limitation does not bar the order.—*Ibid.*
4. It is not necessary that such an order should mention the price of the articles ordered, and stipulate to pay for them. The contract amounts to an agreement to pay what the articles are reasonably worth; and where such an order is accepted and the goods sent, the person ordering them will be liable to pay for them, though he may not actually receive them.—*Ibid.*
5. Generally, in reference to lapse of time, Courts of equity act in obedience to the statute of limitations.—*Murphy et al. v. Blair*, 184.
6. Thus, in cases of equitable title to land, relief must be sought within the period in which ejectment would lie.—*Ibid.*
7. A claim to real estate will not be barred by a lapse of time shorter than that which would bar an action of ejectment.—*Ibid.*
8. In an action instituted in this state, upon a judgment rendered in another state, a plea of the statute of limitations of the latter state will not, as a general rule, be sustained.—*Hendricks et al. v. Comstock*, 238.
9. There may be a distinction between a statute limiting the time within which an action may be brought, and one simply raising a presumption of payment by lapse of time; but a defense based upon either relates to the remedy, and not to the merits, and is governed by the *lex fori*.—*Ibid.*

SEC APPEAL, 1; PLEADING, 5, 6.

#### LIQUOR LAW.

Suit upon promissory notes. Answer, that the notes were given for the consideration of spirituous liquors sold to defendants in 1856, which liquors were not sold for sacramental, &c., purposes. Demurrer to the answer overruled. Judgment for the defendants. Held, that the judgment was erroneous; that the sale of the liquors was not illegal, and was a sufficient consideration for the notes.—*Holmes et al. v. Ebersole et al.*, 392.

See *Holmes et al. v. Welch*, 555.

#### LOTTERY.

1. Action commenced before a justice of the peace, upon a promissory note. No answer. On the trial the defense was, that the note was given for an illegal consideration, namely, for



- services rendered by the plaintiff for the defendant as clerk of the defendant's lottery office. There was no evidence of any special contract before the services were performed; nor was there any evidence that the plaintiff had performed any services of an illegal character.
- Held*, first, that the action having been commenced before a justice, evidence of the consideration was admissible without answer.
- Second, in the absence of proof that the plaintiff performed acts of service which were expressly prohibited by law or public policy, it cannot be conclusively presumed that he did so, because he was the employè of one who might have contemplated or performed such acts; nor can it be presumed, in the absence of proof of the terms of his contract, that by its stipulations he was to perform illegal acts.—*Riggs v. Adams*, 199.
2. The constitutional provision against lotteries, is in restraint of legislative authority to authorize lottery schemes in the state, or the sale of tickets within the state in schemes organized without the state.—*Ibid*.

## M.

## MAYOR.

See OFFICE, &c.

## MENTAL INCAPACITY.

See DEED, 3; EVIDENCE, 16, 17.

## MISJOINDER.

A judgment cannot be reversed, under the code, for error in ruling upon a demurrer for misjoinder of causes of action.—*The President, &c., of Lamasco v. Brinkmeyer*, 349.

## MISTAKE.

Bill in chancery to correct a mistake in a judgment. The facts were these:—A plaintiff was in Court prosecuting a suit upon a promissory note, upon which there was apparently due over 400 dollars. The defendant appeared by attorney authorized by a power to confess judgment for the sum he might find due. He entered his cognovit for 223 dollars, and judgment was taken for that amount by the plaintiff. The suit was not prosecuted for any balance, nor was it shown that there was any understanding or agreement that it should at any future time be prosecuted. There was no pretense of fraud. Six years were suffered to elapse after the discovery of the mistake, before suit was brought. *Held*, that the plaintiff neglected his rights, if he had any, and ought not now to be permitted to contradict that the amount for which the cognovit was executed was the amount due.—*The State Bank v. Campbell et al.*, 42.

See DEED, 6, 7; EXECUTORS AND ADMINISTRATORS, 6; JUDGMENT, 1.

## MORTGAGE.

1. Complaint to redeem mortgaged premises, in substance as follows: That in October, 1853, *Cornelia M. Baker*, being then the owner of the premises in question, with her husband, *Charles F. Baker*, mortgaged the same to one *Martha J. Fish*, to secure the payment of three notes—one for 100 dollars, one for 44 dollars, 62 cents, and one for 55 dollars, 38 cents; that afterwards, said *Martha* assigned the note for 100 dollars, and the mortgage, to *Otis Newton*, who, on the 12th of September, 1854, assigned the note and mortgage to the plaintiff; that the other two notes are owned by *Morse*, and *Morse* and *Woodruff*, who are made defendants; that the mortgage above mentioned is subject to a prior mortgage, exe-



cuted by said *Martha J. Fish*, and her husband, *Charles F. Fish* (she then being the owner of the property), to one *Samuel Bartlett*, to secure the payment of 200 dollars, which last-mentioned mortgage was executed in *March, 1853*, and was assigned by *Bartlett* to *Hubbard*. Prayer, that plaintiffs be permitted to redeem the senior mortgage, and for other relief. Answer, 1. That, at the commencement of the suit, *Woodruff* was the owner in fee of the premises; that the mortgage executed by *Fish* and wife to *Bartlett*, and by him assigned to *Hubbard*, was foreclosed by *Hubbard*, by advertisement and sale pursuant to a power of sale contained in the mortgage, and at such sale *Woodruff* bid off the premises, and became the purchaser. 2. That said *Cornelia Baker* fully paid and satisfied said note of 100 dollars to *Newton* while he was the owner thereof. 3. That after such sale and purchase by *Woodruff*, *Cornelia*, and her husband, conveyed the premises to the plaintiff by deed, which is the plaintiff's only title to the premises. 4. That the plaintiff acted as the agent of said *Cornelia Baker*, in the payment of the note to *Newton*, and after such payment, he caused to be made an assignment of the note and mortgage by *Newton* to himself, but that such assignment conveyed no interest to the plaintiff; that *Emery Morse* and *Morse* and *Woodruff* are the owners of the other notes secured by the mortgage, and the defendants are willing, and offer to pay whatever may be due thereon. Reply, that the plaintiff denies the matters set up in the answer, except so far as they admit the matter charged in the complaint. For all the purposes of the suit, the plaintiff admits the validity of the sale set up, to *Woodruff*, and he raises no question, except as to his right to redeem the premises, reserving his right to contest the validity of such sale in another suit. The evidence showed that on the 15th of *March, 1854*, *Baker* and wife executed to the plaintiff a mortgage on the premises in question, to secure the payment of a note for 306 dollars, given by *Baker* to the plaintiff. The mortgage executed by *Fish* and wife to *Bartlett* was dated *March 28, 1853*; and the sale under the power therein contained, was made on the 31st of *December, 1853*. Between the date of the *Bartlett* mortgage, and the sale under it, viz., on the 14th of *October, 1853*, the mortgage by *Baker* and wife to *Fish* was executed, which, together with the note for 100 dollars, came to the plaintiff by assignment. Mrs. *Baker* furnished to the plaintiff the money paid to *Newton*, to procure the assignment of the note and mortgage to the plaintiff; but from the evidence, it appears to have been the intention of the plaintiff and Mrs. *Baker*, not thereby to cancel or extinguish the note or the mortgage, but to place the plaintiff in a position to redeem the senior mortgage, and in that manner realize as much of the note for 306 dollars, secured by mortgage on the same premises, as possible.

*Held*, first, that although the fee in the premises might have been in Mrs. *Baker*, and although she furnished to the plaintiff the money with which to procure an assignment of the note, by *Newton* to the plaintiff, yet that such payment to *Newton*, with the money thus furnished, did not necessarily cancel or extinguish the note or the mortgage, so far as it was a security for the payment of the note. The transaction, on its face, did not purport to be a payment and extinguishment of the note or mortgage, as they were both duly assigned to the plaintiff. The general rule of law is, that where the mortgage and the fee vest in the same person, and in the same right, the mortgage is merged in the fee simple. But notwithstanding this technical rule of law, it is well settled that a Court of equity will keep an incumbrance alive, or consider it extinguished, as will best subserve the purposes of justice, and the actual and just intention of the party.

Second, that, under the circumstances, although Mrs. *Baker* furnished the money that procured the assignment of the note and mortgage to the plaintiff, the transfer to him is valid, and vests in him the same right which *Newton* held before the assignment.

Third, that the plaintiff, holding a mortgage which accrued before the sale, was not in any manner prejudiced thereby, nor were his rights, as such holder, affected by the sale. So



far as his rights under the mortgage thus assigned to him are concerned, the case stands as if no sale had been made. To protect himself and secure his own claim, he has a right to redeem the prior mortgage.

Fourth, that the plaintiff, holding a note and mortgage executed before the sale, and the sale not in any manner affecting his rights, so far as that note and mortgage are concerned, he has a right, for the purpose of securing the benefit of his mortgage, to redeem the prior incumbrance.—*Howe v. Woodruff et al.*, 214.

2. Under the R. S. of 1852, a complaint to foreclose a mortgage need not aver that no proceedings had been instituted at law. Such proceedings, if any were had, should be set up in defense.—*Newton et al. v. Newton*, 527.

3. Bill in chancery to foreclose a mortgage. The facts were these: *A.*, in 1838, bought the mortgaged premises of *B.*, and for a part of the purchase-money indorsed to *B.*, in blank, two promissory notes, to secure the payment of which he executed the mortgage. The notes and mortgage were assigned to *C.*, who, without suit against the makers of the notes, brought suit to foreclose the mortgage. The condition of the mortgage was, that if the notes (describing them) were paid at the time for the payment thereof by the makers, &c., or by *A.*, the indorser, &c., without delay, the indenture and the estate granted were to be void; but in case of failure of such payment, the indenture and the estate granted were to be absolute. It was proved that the notes, or some part of them, could have been collected from the makers had diligence been used; that in 1839 and 1840, they owned personal property, &c.; that no demand was made upon them for the money; that *A.* was never notified of non-payment; that in 1842, the makers were decreed and certified bankrupts.

*Held*, first, that diligence was not used; that if it had been, it would have been availing; and, hence, that *A.* was not liable as an indorser.

Second, that the indorsements cannot be construed as a part of the condition of the mortgage, because they were made concurrently with it.

Third, that an indorsement, though in blank, is a written contract; but its terms may be varied or controlled by a contemporaneous written agreement.

Fourth, that the parties, in this case, intended so to control the contracts implied by the indorsements; because by the condition of the mortgage they agreed that the deed should become absolute, if the notes were not paid when due, without delay; and because the mortgagor agreed to pay the notes if the makers failed.

Fifth, that the whole transaction showed that the notes were assigned to the mortgagees, and were by them accepted, in view of their payment when they matured.—*Zekind et al. v. Neokirk et al.*, 544.

4. *B.*, as executor of *S.*, brought a suit upon three promissory notes, and to foreclose a mortgage. The notes were made by *E.* to *S.*, *C.* and *I.*; and the mortgage was made to *I.* for the use of himself, *C.* and *S.* It is averred that *C.* and *I.*, upon some agreement not known to the executor, transferred the notes and mortgage to *S.*, by assignment not in writing, and by delivery. *E.*, *C.* and *I.* are made defendants. There was a judgment by default, and a foreclosure of the equity of redemption, as to all the defendants. It was insisted that the judgment was erroneous, because there is nothing upon the record showing the assignment, and because the equity of redemption of *C.* and *I.* was foreclosed. *Held*: As to the first point, an equitable assignment is shown, and the statute authorized the proceeding in the form adopted. The default admitted the truth of the averments, as to the assignment and delivery, &c. As to the other point, *I.* and *C.* had no equity of redemption to foreclose; and as to them, the entry is a mere misprision of the clerk, without injury.—*Eggleston et al. v. Barnes*, 604.



## MUNICIPAL CORPORATIONS.

See *Waldo v. Wallace*, 569; *Wood v. Mears*, 515.

## MURDER.

See *French v. The State*, 670.

## N.

## NEW TRIAL.

1. The statute provides for but one new trial, as a matter of course, in actions brought to recover real estate.—*Ewing et al. v. Gray et al.*, 64.
2. Where judgment has been rendered for the right party, but for excessive damages, it is ground for a new trial, and can only be taken advantage of under the code, by that method.—*Campbell v. Swasey et al.*, 70.
3. The Supreme Court will not review the action of an inferior Court, in granting a new trial, unless great injustice appears to have been done.—*Hust v. Conn*, 257.
4. The statutory rule touching new trials on account of newly discovered evidence, that the application must be in writing and sustained by affidavit, applies, whether the application be made at or after the term at which the verdict was rendered.—*McDaniel v. Graves et al.*, 465.
5. A complaint for a new trial on account of evidence discovered after the term at which the verdict was rendered, is defective without an affidavit showing the truth of the alleged cause.—*Ibid.*
6. And if the complaint does not show upon its face that the new evidence was not discovered during the term at which the verdict was rendered, it is bad. An averment that it was discovered since the trial of the cause is not sufficient.—*Ibid.*
7. Where the record does not disclose the fact that any motion for a new trial was made, except inferentially, by stating that the motion was overruled, while no written reasons for a new trial appear to have been filed at all, the motion should be overruled.—*Fausett v. Voss*, 525.
8. A new trial ought not to be granted because of the admission of improper evidence upon the former trial, unless the illegality thereof be shown.—*Griffith v. The State*, 548.
9. Suit against an administrator upon a promissory note purporting to have been made by his decedent. Answer, *non est factum*. There was conflicting evidence as to the handwriting of the deceased. Verdict and judgment for the defendant. In support of a motion for a new trial on the ground of newly discovered evidence, the plaintiff filed an affidavit setting forth "that, on the morning after the trial, he was for the first time informed that a certain Mrs. B. knew something about the claim that he had upon the estate of M., deceased, and upon a note that was before the Court for investigation on yesterday; that he was this morning informed that Mrs. B. knew something of the matter in issue that was material, and forthwith procured her affidavit; that he can have the evidence of Mrs. B. if he can have a new trial; that she lives in the city of Madison, and he can have her evidence, and if he had known, or had the means of knowing it, he would have had her testimony when the cause was tried; that his claim is just, and that said M. made said note, is absolutely true, and were he alive no objection would ever have been made; that he wishes a new trial for justice only." The affidavit of Mrs. B. sets forth "that in the month of January, 1853, she was in the store of the plaintiff in Madison, and M., since deceased, came in, and a talk commenced about a certain note that H. held against M., and M. made a payment upon the note in her presence; that she heard the amount named that he paid;



but is not certain what the amount was, but it was between 20 dollars and 40 dollars, or thereabouts; that she saw it counted and laid in two piles, the small bills were put together in one pile, and the larger bills in another; that the money was all bank bills; that she saw the note, and heard *H.* read to *M.* payments made upon the note as marked upon it; that some of the payments were made by other persons than *M.*; that one of the payments was made by *H.*, one by *P.*, one by *J.*, and another by *H.* She well recollects that *M.* said he would pay the balance of the note between that time and the spring; that she was waiting there to buy some goods, and had to wait until they got through. She does not recollect that she heard the amount of the note exactly; but from all she heard, she thinks it was a considerable amount."

*Held*, first, that the facts sworn to by Mrs. *B.* identified the note, and, in the state of the evidence, might have changed the result.

Second, that the lateness of the discovery of the evidence was not owing to a want of diligence.

Third, that the evidence would not have been merely cumulative.

Fourth, that written reasons for a new trial are sufficient, if they, with reasonable certainty, apprise the Court and the opposite party of the ground upon which the new trial is asked. The language of the statute need not be followed.—*Humphries v. The Administrators of Marshall*, 609.

10. Where the refusal to sustain a motion for a new trial was not made the subject of an exception, the action of the Court relative to that motion is not properly before this Court, and the case stands in this Court as though no such motion had been made. And there being, in effect, no motion for a new trial, points involved in other exceptions are not examinable.—*Banks v. Hempstead*, 618.

See PRACTICE, 2, 26, 29, 30.

And see *Kent v. Lawson*, 675, at length.

#### NON-RESIDENT.

See COSTS, 3, 4.

#### NOTICE.

See SUBSCRIPTION OF STOCK, 2.

*Of Appeal.*]

See APPEAL, 3.

*Of Contracts.*]

See CORPORATIONS, 2.

*Of Inquest of Damages.*]

See DAMAGES, 8.

*To Heir, of Sale of Land.*]

See SALE, 6.

#### NUISANCE.

See INJUNCTION; RAILROAD COMPANY, 7.

#### O.

#### OFFICE—OFFICER.

1. In determining whether or not an office is judicial in its character, within the meaning of § 16, art. 7, of the constitution, the Courts will, where the statute is not clear upon the point, look to the jurisdiction and duties of the officer.—*Waldo v. Wallace*, 569.

2. The mayor of a city, organized under the general law of 1857, is a judicial officer, within the meaning of that constitutional provision, if at the time of his election no order had



been made by the city council for the election of a city judge, and no such judge had been elected.—*Ibid.*

3. The executive and administrative duties of the mayor of a city, under the act of 1857, are not within the executive and administrative departments of the state government, as established by the constitution. In respect to such duties, the mayor is merely an officer of a municipal corporation; and he may discharge such duties and his judicial functions at the same time, without violating § 1 of art. 3 of the constitution.—*Ibid.*
4. The judicial duties of the mayor are not incidental to his municipal office, but separate and independent of it; for he is clothed, in this respect, with general power to administer, judicially, the laws of the state.—*Ibid.*
5. The statute conferring judicial powers upon the mayor of a city, is not unconstitutional.—*Ibid.*
6. The mayor of a city, under the act of 1857, when acting as such, is not a state officer; and in acting both as mayor and city judge, he acts in two capacities. Thus, the same act may, on the same day, be punished by him once as mayor, acting for the city, and once as judge, for a violation of the laws of the state; and one of these prosecutions will be no bar to the other. PERKINS, J.—*Ibid.*
7. And though he would act in two capacities or offices, but one of them would be an office under the state. PERKINS, J.—*Ibid.*
8. A Court is a tribunal charged with a substantive duty—the exercise of judicial power; and a judicial officer is the person appointed to exercise that power. PERKINS, J.—*Ibid.*
9. A judge will be not the less a judicial officer because some duties he may have to perform are administrative in their character; nor will an administrative officer become a judicial officer simply because some of his duties may be, to some extent, judicial in their character. PERKINS, J.—*Ibid.*
10. The duties of a mayor, as a state officer, are entirely judicial; and they are continuous for his official term, and are discharged in the form and with the effect of proceedings in the other Courts of the state. PERKINS, J.—*Ibid.*
11. A mayor being a judicial officer of the state, elected in a manner which, under the unrestricted power of creating Courts conferred by the constitution, the legislature might adopt, he is ineligible to any office other than a judicial one, during the term for which he is elected. PERKINS, J.—*Ibid.*

See SHERIFF, 4.

#### OFFICIAL BOND.

*Suit upon a Constable's.*]

See EVIDENCE, 14.

*Suit upon an Administrator's.*]

See EXECUTORS, &c., 6.

#### OPEN AND CLOSE.

Suit to recover damages for the breach of a contract. Answer, that the contract was obtained by fraud. Reply in denial. *Held*, that the defendant had the open and close.—*Patton v. Hamilton*, 256.

#### P.

#### PARTIES.

1. Junior mortgagees are not necessary, but they are proper, parties to the suit of a senior to foreclose.—*Mack et al. v. Grover*, 254.



2. Although the claims of judgment-creditors be several, they may unite in a suit to set aside a fraudulent conveyance, and subject the property to the payment of their judgments. At least, the defendant cannot complain of the joinder.—*Ruffing et al. v. Tilton et al.*, 259.
  3. Suit upon a promissory note. The plaintiff assigned the note *pendente lite*, and moved to have the assignee substituted as plaintiff. The Court refused. *Held*, that this was matter of discretion.—*Jones v. Julian*, 274.
  4. *B.* brought an action of attachment against the steamboat *Crystal Palace*, and her master, *K.*, came in and filed an undertaking, with *F.* as surety, for the payment of any judgment *B.* might recover. *F.* was in no other way a party to the suit. The Court rendered judgment against *K.* and *F.*, who appealed. *Held*, that the judgment against *F.* was erroneous; and that, inasmuch as he was not a party to the suit, and had no notice of the proceedings therein, he could avail himself of the error without having excepted in the Court below.—*Kantz et al. v. Bright*, 313.
  5. If a defendant to an action in the Circuit Court, die after service of process therein, the action may, under 2 R. S. p. 32, § 21, be prosecuted in that Court to final judgment against his administrator.—*Lawson v. Newcomb et al.*, 439.
  6. Where a defendant to an action for the cancellation of a deed for non-delivery, conveyed his interest in the land, after the suit was commenced, and the issues formed, but before the trial, it was held that, under the code, his co-defendants could not introduce him as a witness to prove the delivery of the deed, without having his name stricken from the record as a party; that the striking out of the party's name was a matter of discretion for the Court; and that where a discretionary power is not improperly exercised, the Supreme Court will not interfere.—*Dearmond et al. v. Dearmond et al.*, 455.
  7. Where the party whose name is sought to be thus stricken out has made costs, and the motion to strike out is not accompanied by an offer to pay costs, or let a judgment be rendered against him for costs, it is not error to refuse to discharge him.—*Ibid.*
- See CONTRACT, 9; EXECUTION, 1; EXECUTORS AND ADMINISTRATORS, 14; PLEADING, 8, 9; WITNESS, 6, 7, 8.

# PARTITION.

1. The fact that a part of the heirs of an estate are infants, is no bar to a suit by any one of them for partition; and the Court may set off the share of a single heir, leaving the shares of the others undivided, if such partition is desired, and the property is susceptible of division without injury to the estate.—*Shull et al. v. Kennon et ux.*, 34.
2. Where partition cannot be made, a sale of the property is legal.—*Ibid.*
3. A party to a partition suit will be held to be a competent appraiser of the lands, upon proceedings being taken for the sale thereof, if it do not appear that he is an heir, a devisee, a legatee, or a purchaser of some part thereof, or that he is otherwise interested.—*Ibid.*
4. Where lands to be divided lie in two counties, partition or sale of them may be made by the Court in one of the counties, and only one set of appraisers is necessary.—*Ibid.*
5. Although parties may be willing and competent to make partition of their lands among themselves, yet either of them may commence proceedings for partition under the statute, without first making an effort for an agreement upon the terms of partition without such proceedings.—*Lake et ux. v. Jarrett et al.*, 395.
6. Where the Court ordered commissioners to set apart to each of the parties to the proceeding for partition one-fifth of the premises, the commissioners reported that the land was not susceptible of partition, without great detriment to the parties, and recommended a sale according to law. The defendants objected to the sale, and protested against the sale of their part, and asked that it might be set off. The objections to the report were, 1. That it was



untrue. 2. That it did not set forth the facts upon which the opinion of the commissioners was based. But the Court overruled the objections and ordered the sale.

*Held*, first, that if the meaning of the report was, that the partition could not be made into fifths, as ordered, the Court erred in ordering the defendants' part to be sold, without a report showing that their part could not be divided from the rest without detriment, &c.; but if the report meant that the defendants' share could not be so set off to them, then the second objection of the defendants to the report should have been sustained.

Second, that the report would have been sufficient, in the absence of any objection.—*Ibid*.

7. A report of commissioners appointed to make partition of real property, to the effect that the same was not susceptible of division, should not be set aside on the ground that it is false, without legitimate proof of its falsehood.—*Patterson v. Blake et al.*, 436.

See PARTNERSHIP, 3.

### PARTNERSHIP.

1. Where *A.* and *B.* held themselves out as partners in a certain business, and *C.* contracted with *A.* to sell and deliver an article within the scope of that business, understanding that he was dealing with the firm; *held*, that *A.* and *B.* were both liable on the contract, though they might not, in fact, have been in partnership, and though *A.* did not intend, in making the contract, to pledge the credit of the firm, but only his own individual credit.—*Booe v. Caldwell et al.*, 12.

2. It must affirmatively appear, in such case, that the sale was made on the individual credit of the party purchasing, and on his own account.—*Ibid*.

3. Real property which constitutes the stock in trade of a partnership that has no outstanding debts or liabilities, may, upon the application of part of the firm, be divided among the partners according to their respective interests therein.—*Patterson v. Blake et al.*, 436.

### PART PAYMENT.

See LIMITATIONS, 2.

### PATENT.

See CONTRACT, 1, 2, 4.

### PAYMENT.

*A.* made a contract with the authorities of the city of *New Albany*, to grade, pave, &c., part of one of the streets thereof, under the statute for the incorporation of cities, 1 R. S. p. 217; and *B.* became surety for the performance of the contract. *A.* received from *C.*, one of the property owners along the line of street to be graded, &c., in advance of estimates, the full amount for which he would have been liable upon the completion of the improvement, and died, leaving it still incomplete. *B.*, his surety, completed the work upon the contract, to save himself from liability thereon, and then brought suit against *C.*, in the name of the city, to recover the value of such work. *Held*, that he could not recover, because the payment to *A.* was, under the circumstances, a satisfaction of the demand.—*Broker v. The City of New Albany*, 417.

See MORTGAGE, 1.

### PLEADING.

1. Suit by the assignee on promissory notes, and to foreclose a mortgage. Answer, admit-



ting the execution of the notes and mortgage; that they were held by the plaintiff, as assignee, and had not been paid; but setting up a counter-claim as follows: That they were given to secure the payment of the balance of the price of a steam engine and boiler which, by agreement, A., D. & Co. manufactured for the defendants, to be used in a saw-mill, of which the makers had knowledge, and made them expressly for that purpose; that the payee was one of the firm of A., D. & Co.; that said boiler was worthless, in consequence of defects in materials and workmanship; that soon after it was set up, owing wholly to said defects, it burst, by which it was destroyed, and damaged the defendants by injury to the mill, &c.; that the price paid was a fair price for a good article for that purpose; that defendants had no knowledge of the defects; that the value of the other machinery was less, after the bursting, than the sum already paid. Prayer, that the damages, &c.; may be allowed, &c. *Held*, sufficient on demurrer.

*Held*, also, that if the engine, &c., proved unsound and unfit for the purpose for which it was to be applied; and if, in attempting to apply it, the purchaser, without fault on his part, in consequence of such unsoundness and unfitness, suffered damage by the destruction of that kind of property which it was reasonable that the parties to the contract contemplated would be necessarily placed in close proximity to such machinery, the injury must be viewed as the natural and legitimate result of the breach of the warranty.—*Page v. Ford et al.*, 46.

2. Reply 1. A general denial. 2. Specific denials, and an averment that if defects existed they were not known to the makers, &c. 3. That the engine, &c., was put up under a contract in writing; that after it was set up and put in operation, the defendant accepted the same, and said contract was canceled and destroyed, and the notes and mortgage executed, &c. The specific denials in the second paragraph of the reply were stricken out, on the ground that they but repeated the issue made by the general denial.

*Held*, first, that issues presented to a jury should be plain and simple. Repeated denials of the adversary pleading tend to complicate the issues.

Second, that after the special denials were stricken out of the second paragraph of the reply, it was bad on demurrer.

Third, that the third paragraph of the reply was bad, because the alleged written contract was not set forth, either by copy or in substance; and because the terms or acts of acceptance were not stated.—*Ibid*.

3. If several paragraphs of an answer amount to no more than a general denial of the complaint, which is also contained in the answer, they will be stricken out on motion.—*Campbell v. Swasey et al.*, 70.

4. Where the complaint in replevin alleges ownership and right to possession, in the plaintiff, possession by the defendant without right, and unlawful detention from the plaintiff; and the defendant answers, denying the detention, and setting up property in a stranger: *Held*, that there is a good issue without reply—the answer denying the detention, a material allegation in the complaint, and argumentatively denying property in the plaintiff by alleging property in a stranger.—*Riddle v. Parke*, 89.

5. If the complaint be upon a verbal contract, and the answer set up the statute of limitations, and the reply set up a written contract not within the statute, this, it seems, would be a departure; but if the parties go to trial upon such replication without objection, the defect is waived.—*Prenatt v. Runyon*, 174.

6. The reply, in this case, set up, 1. That the cause of action did accrue within six years, as it is brought upon a running, open, and unsettled account, some of the items of which are within the six years. 2. That a portion of the goods were sold upon written orders.

*Held*, that, waiving the objection of departure, the reply was good, in avoidance, so far as it went; that the plaintiff had a right to set up matter which would take a part of his cause of action out of the statute; that if a reply purport to avoid the answer entirely, while one



branch of it avoids it in part only, the defect must be objected to in the Court below; that objection to the duplicity of the reply should also have been taken below—else it is waived, and the whole pleading will be deemed to be controverted.—*Ibid.*

7. Suit upon a note by the payee against the maker. The note was filed with the complaint, and thus became a part of it. Answer, that the note had been transferred by delivery, before the commencement of the suit, to one *Cooper*, whose christian name was to him unknown. He appended interrogatories to the plaintiff, calling upon him to state if such were not the fact, and added an affidavit for a continuance, on the ground that he could not prove the alleged transfer of the note by any one else, and that he expected "to elicit facts by the answer to the above interrogatories material to him on the trial," touching the fact of such transfer. He swore that he had been informed and believed the fact alleged in the answer to be true. The Court sustained a demurrer to the answer, refused the continuance asked, and, the defendant refusing to answer further, heard the cause and gave judgment for the plaintiff for the amount of the note, &c. Held, that the answer was too uncertain, and might have been set aside on motion.—*Doyle v. Watt*, 342.
8. Suit by the assignees on a promissory note. Answer, 1. A set-off against the maker, before notice of assignment. 2. Payment to him before such notice. Afterwards, a third paragraph was filed, to the effect that, at the time the defendants delivered the goods and paid the notes, as in the two former paragraphs set forth, the maker was the owner of the note, and promised to deliver it to the defendants, but failed to do so, and fraudulently assigned it to the plaintiffs, without their knowledge and without consideration; but that the legal interest in the note was, at the time of such delivery, &c., in the defendants, and that the plaintiffs never had legal title thereto. Prayer, that the maker be made a party. Held, first, that the third paragraph was bad either as an answer, or as a petition for a new party, if one could be presented. Second, that it was but a repetition of an answer already in, and, therefore, issue upon it was not necessary. Third, that as no reason appeared for making the proposed new party, he was a competent witness.—*Frear et al. v. Bryan et al.*, 343.
9. A party should not be joined as a co-plaintiff who has not, as the pleadings stand, any unity of interest with those already plaintiffs; nor should such a new party be made merely for the purpose of settling matters between him and the defendant, in which the original plaintiffs have no interest.—*Ibid.*
10. Action to enjoin the extension of a street through the plaintiff's land. The complaint set up title. Answer, that the plaintiff had no title or interest in the land, rejected, on motion, as tendering an immaterial issue. A general traverse was also pleaded. Held, that the matter of the rejected paragraph was material; but that as it might have been proved under the general traverse, there was no error in rejecting it.—*The President, &c., of Lamasco v. Brinkmeyer*, 349.
11. A complaint upon a promissory note executed for the purchase-money of real property, and praying for the enforcement of the vendor's lien against the same, is sufficient under the code, without an averment that a judgment had been obtained upon the note in the ordinary form, execution issued thereon, and a return of "no personal property found," &c., or any equivalent averment.—*Scott v. Crawford*, 410.
12. In actions commenced before a justice of the peace, no reply is necessary. Hence, if, upon appeal to the Circuit Court, the plaintiff file a reply which leaves a part of the answer neither denied nor avoided, the defendant will not, therefore, be entitled to judgment on the pleadings.—*Turner et al. v. Simpson*, 413.
13. An answer setting up new matter which is untrue, and intended merely to delay the trial,



- will be deemed a sham defense, though, in point of law, good on its face.—*Beeson et al. v. McConatha*, 490.
14. Where a defendant, by answers to interrogatories under oath, concedes his answer to be false, the Court will strike it out, on motion, as a sham defense, though good on its face.—*Ibid.*
  15. A demurrer to a complaint, because "the complaint does not state facts enough to entitle the plaintiff to relief," is substantially within the fifth specification of § 50, 2 R. S. p. 38.—*Pace v. Oppenheim et al.*, 533.
  16. A joint demurrer filed by two defendants should be overruled, unless it be well taken as to both.—*Ibid.*
  17. Complaint as follows: That on, &c., plaintiff and defendant, at, &c., were partners in the business of, &c.; and on or about said day, they dissolved partnership, the plaintiff sold his interest to defendant for the sum of 466 dollars, and defendant gave his notes for 338 dollars, and assumed the payment of ——— due from plaintiff to *L.*, which said defendant refused to pay, which sum was 88 dollars, 48 dollars whereof the defendant paid said *L.*; and that said *L.* also assumed the payment of 88 dollars, 50 cents, due from plaintiff to *M.*, which said defendant refused to pay, and said *M.* sued plaintiff and recovered the sum specified, to the damage, &c.; wherefore, &c. *Held*, bad on demurrer.—*Jackson v. Hart*, 605.
  18. The pendency of an action in one state cannot be pleaded in abatement of an action between the same parties and for the same cause, in another state.—*DeArmond et al. v. Bohn et al.*, 607.
  19. The third clause of § 50, 2 R. S. p. 38, must be construed accordingly.—*Ibid.*
- See ACCOUNT STATED; ASSIGNMENT, 3; BILLS OF EXCHANGE, 5; CONTRACT, 5, 11, 12, 15; COUNTER-CLAIM; INFORMATION; INTERROGATORIES; JUDGMENT, 1; MORTGAGE, 2; PARTIES; PRACTICE, 7, 8, 25; PROMISSORY NOTES, 1, 2, 4, 5; RECOGNIZANCE; SET-OFF; SLANDER; SUBSCRIPTION OF STOCK, 4, 5, 6; STREETS; WARRANTY.

### PLEDGE.

1. The pledgee of a promissory note, who settles with the maker and surrenders it, thereby becomes liable to account to the pledgor for the full amount thereof.—*Dupuy v. Clark*, 427.
2. If the pledgee of a promissory note, upon settlement, surrender it to the maker, in consideration of a sum of money equal to the debt for which it was pledged, and a reasonable compensation for collecting the same, and another promissory note for the balance, the pledgor may demand either such other note, or the full amount of the original pledge, after deducting the sum for which it was pledged, and such reasonable compensation.—*Ibid.*
3. If the pledgee of a promissory note settle with the maker and surrender it to him for a sum of money equal to, or greater than, the debt thereby secured, and another promissory note for the balance, the pledgor may maintain suit for the amount of the pledge without first having made a demand.—*Ibid.*

### PRACTICE.

1. Where a cause was not tried by a jury, and hence no question of law was raised by instructions or a special verdict, and the Court was not asked to state a case presenting the questions of law, the Supreme Court will not examine the questions of fact, but the judgment will be affirmed as in an ordinary appeal upon the weight of conflicting evidence.—*Nave v. Nave et al.*, 1.
2. *It seems* that points of law raised during the trial of a cause, should be treated as waived, unless they were again brought under review in the Court below by the written reasons upon a motion for a new trial.—*Ibid.*



3. A pleading rejected, or a part of one stricken out, is no part of the record, on appeal, unless made so by a bill of exceptions. The clerk cannot make such pleading or part of a pleading a part of the record, by copying it into the record, and referring to it as the pleading or part rejected.—*Saunders v. Heaton et al.*, 20.
4. Where an agreement of parties would seem to dispense with the necessity of evidence, and the record contains none, it may be inferred that there was none.—*McEndree et al. v. McEndree*, 97.
5. Under the code, a summons issued upon a præcipe, before the filing of the complaint in the cause, will be set aside on appearance and motion.—*Hust v. Conn*, 257.
6. An attorney acting as *amicus curiæ* cannot take an exception.—*Ibid.*
7. Where the complaint does not show that the summons was prematurely issued, a demurrer based upon that defect is bad.—*Ibid.*
8. If the defendant appear and demur to the complaint, he will not afterwards be allowed to question the validity of the summons.—*Ibid.*
9. The motion in arrest of judgment preceding a motion for a new trial, affirms the verdict, and cuts off the motion for a new trial.—*Shrewsbury et al. v. Smith et al.*, 317.
10. If a mistake in not having a witness sworn, is discovered before the jury retire, it may be corrected by swearing the witness and rehearing his testimony; or the jury may be instructed to disregard his statements.—*Slauter v. Whitelock*, 338.
11. If no motion be made upon the discovery of the mistake, the parties will be deemed to have acquiesced in the reception of the unsworn statements as evidence.—*Ibid.*
12. And where such mistake was assigned as one of the written reasons for a new trial, but the record did not show, by affidavit or otherwise, when the mistake was discovered, if discovered at all before judgment, or whether any motion was made to correct it, the ruling of the Court refusing a new trial was sustained.—*Ibid.*
13. Under the code, the Court may render judgment for one of several joint plaintiffs, and against the others; or a larger sum for one, and a less one for the others; and so of defendants. The Court possesses chancery powers in adapting its judgments to the rights of the parties.—*Draper et al. v. Vanhorn et al.*, 352.
14. An appearance without objection, waives a previous discontinuance of the cause.—*Breeze et al. v. Allen*, 426.
15. After a cause has been dismissed with permission of the Court, and final judgment of dismissal rendered, the cause is no longer pending in Court, though the judgment for costs, rendered upon the dismissal, has not been paid.—*Ibid.*
16. An *amicus curiæ* cannot take an exception to the ruling of the Court.—*Ibid.*
17. Held, on the authority of *Carver v. Williams*, 10 Ind. R. 267, that a defendant who has answered and then withdraws his appearance, thereby withdraws his answer also.—*Sloan et al. v. Wittbank*, 444.
18. Held, also, on the authority of *Key v. Robinson*, 8 Ind. R. 368, and *Shaw v. Binkard*, 10 id. 227, that the failure to call and default a defendant, who, after having appeared and answered, withdraws his appearance, is an irregularity: but such an irregularity as the Court below might amend; and which may be deemed to be amended in the Supreme Court.—*Ibid.*
19. The Supreme Court takes notice judicially of the commencement and close of the terms of the Circuit Court.—*Morgan v. The State*, 448.
20. If there be a cause on trial undisposed of at twelve o'clock on the night of the last day of the term, it will be assumed that the term did not close until that time.—*Ibid.*
21. Section 793, 2 R. S. p. 222, contemplates an adjournment to a subsequent term, and not to a day in vacation.—*Ibid.*
22. In this case, upon the jury reporting that they could not agree, and the defendant not con-



senting to their discharge, the judge adjourned the Court on *Saturday*, the last day of the term, at six o'clock, P. M., until the next *Monday*, a day in vacation, without placing upon record any valid reason for such adjournment, and ordered the jury to be confined until that time. *Held*, that the order of adjournment, so far as it directed the Court to convene on *Monday*, and the confinement of the jury until that day, was a nullity; that the term was finally adjourned and the cause discontinued.—*Ibid*.

23. A judge of the Common Pleas has the power to revoke letters of guardianship, for certain causes pointed out in the statute; but this he is authorized to do only while sitting as a Court at a regular term. The proceedings of this case having occurred in vacation, and not in term time, must be held inoperative.—*Lunger v. The State ex rel. Hathaway*, 483.
24. It is not error to refuse to postpone a cause on account of the testimony of an absent witness, unless the materiality of such testimony is shown.—*Griffith v. The State*, 548.
25. Suit for animals killed by the cars, &c., commenced before a justice, where a demurrer was filed to the complaint and overruled; judgment for plaintiff. On appeal, no action appears to have been taken by the Common Pleas upon the demurrer; but a trial was had, and judgment for plaintiff. It is insisted that the failure to take action upon the demurrer, was an error that should reverse the case. After the demurrer was overruled before the justice, a trial was had upon issues of fact, which the statute put in. Upon the appeal, the party demurring did not again bring forward the question upon the demurrer, but went to trial upon the issues of fact. *Held*, that this operated as a waiver of any right which he had, to have the demurrer determined.—*The Indianapolis, &c., Railroad Co. v. McAhren*, 552.
26. Any matter for which a new trial may be granted, is waived by the neglect of the party to move for a new trial.—*Kent v. Lawson*, 675.
27. The overruling of a motion for a continuance is clearly within the first specification of § 355 of the code of civil practice.—*Ibid*.
28. Errors in rejecting proper, or in giving to the jury improper testimony, or in giving to the jury improper instructions, or in refusing proper charges, are clearly within the eighth specification of the same section; but error in reference to the validity of the pleadings, is not within the section at all.—*Ibid*.
29. For causes coming within the sixth specification of that section, a motion for a new trial must be made in the Court below, in order to present any question in the Supreme Court.—*Ibid*.
30. The same principle requires such motion to be made for every cause specified in the statute for which a new trial may be granted.—*Ibid*.

See BILL OF EXCEPTIONS; BRIEF; CERTIORARI; CONSTITUTIONAL LAW, 4; COSTS; DISCONTINUANCE; ERROR; EVIDENCE; INTERROGATORIES; INSTRUCTIONS; JUDGMENT BY DEFAULT; JURY; JUSTICE OF THE PEACE; MISJOINDER; NEW TRIAL; OPEN AND CLOSE; PARTIES, 4, 6, 7; RECOGNIZANCE; REHEARING; REFERENCE; VENUE; VERDICT; WITNESS.

### PRÆCIPE.

See PRACTICE, 5.

### PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION.

### PROMISSORY NOTES.

1. Suit upon a promissory note. Answer, that the note was in consideration of, and in part



payment for, certain land described. *Held*, that this allegation is material, and must be proved; but strict proof is not required.—*Bray v. Pearrell et al.*, 334.

2. If the maker of a promissory note take it up by executing to the same payee new notes for the same amount, the consideration of the new notes is the same as that of the old; and the maker may set up a failure of consideration in defense of a suit by an assignee upon the new notes.—*Ibid.*
3. The contract of an indorser of a note payable at bank, is, that he will pay it on failure of the maker to do so on proper presentment and demand, if he, the indorser, is duly notified of such failure of the maker.—*Blackledge v. Benedict et al.*, 389.
4. Such demand, failure, and notice, where no legal excuse for failure to demand, &c., exists, are a condition precedent to the liability of the indorser, and a complaint which fails to aver these facts, in a suit against the indorser, does not state facts sufficient to constitute a cause of action. This objection to a complaint is good on appeal.—*Ibid.*
5. Suit upon a promissory note given for a subscription of stock in a railroad company. There was an answer alleging that the note had been delivered to one Jones, who was authorized to collect it, and apply the proceeds upon a debt due from the company to him. *Held*, that this answer showed the beneficial interest in the note to be in Jones, and a demurrer to it should have been overruled.—*Gillispie v. The Fort Wayne, &c., Railroad Co.*, 398.

See **BILLS OF EXCHANGE**; **HUSBAND AND WIFE**, 8, 9; **LOTTERY**, 1; **MORTGAGE**, 1, 3; **PARTIES**, 3; **PLEADING**, 1, 7, 8, 11; **PLEDGE**; **VOLUNTARY ASSIGNMENT**.

#### PROCESS.

Service of process upon a conductor of a railroad train is sufficient to compel the appearance of the company.—*The New Albany and Salem Railroad Co. v. Tilton*, 3.

See **AMICUS CURIAE**, 2; **JUDGMENT BY DEFAULT**, 9; **PRACTICE**, 5, 7, 8; **PUBLICATION**; **RETURN**.

#### PUBLICATION.

1. Unless defendants were shown to be non-residents of the state, they could not be proceeded against by publication, under the R. S. 1843, p. 833, § 14; and § 40, 2 R. S. p. 36, is substantially the same.—*Johnson et al. v. Patterson et al.*, 471.
2. The case of *The Unknown Heirs of Whitney v. Kimball*, 4 Ind. R. 546, approved.—*Ibid.*

#### PURCHASE-MONEY.

See **JUDGMENT**, 2.

#### R.

#### RAILROAD COMPANY.

1. The statute regulating the fencing of railroads (Acts of 1853, p. 113), is in the nature of a police regulation, by which railroad companies are required to fence their roads, or to hold themselves liable, to a certain extent, for animals injured for the want of such fences. It is not so much a measure of protection to the owners of such animals, as it is a regulation for the safety of passengers; and the legislature possesses the power to incorporate such a provision in a charter or general law authorizing the formation of companies; and, looking to the protection of human life, such a regulation may be prescribed, as in this case,



after the road has been constructed, even where the company's charter is not amendable, without interfering with vested rights, or violating a contract.—*The New Albany and Salem Railroad Co. v. Tilton*, 3.

2. The act of March 1, 1853 (Acts p. 113), providing compensation to the owners of animals killed or injured by the cars, &c., of railroad companies, is more for the benefit of the public—to guard against injury to passengers—than for the benefit of the owner of the animal.—*The New Albany and Salem Railroad Co. v. Maiden*, 10.
3. Thus, such owner might be passively a wrongdoer, by suffering his animal to run at large, and yet recover.—*Ibid.*
4. Hence, the company cannot divest itself of responsibility by making private contracts with the landholders along their road, by which the latter separately agree to make and keep up fences.—*Ibid.*
5. The statute of 1853 in relation to the liability of railroad companies whose roads are not fenced, for killing stock, does not apply to actions commenced in Courts of Common Pleas, and Circuit Courts; but only to such as are brought in justices' Courts.—*The Evansville, &c., Railroad Co. v. Ross*, 446.
6. The act of 1859 extended the rule established by the act of 1853 for the decision of causes brought in justices' Courts, against railroad companies for killing stock, to actions of the same class brought in Courts of Common Pleas and Circuit Courts.—*Ibid.*
7. A railroad in a city is not, necessarily, a nuisance, and an injunction cannot be sustained on that ground. And a suit to obtain compensation for damages by a statutory writ of assessment, must fail, because the appropriation of a public street to the use of a railroad, is not a taking of the private property of the owners of adjoining lots, within the meaning of the statute giving that remedy. The action must be one for damages for an injury as at common law, if one lies at all.—*The New Albany, &c., Railroad Co. v. O'Daily et al.*, 551.

See ANIMALS RUNNING AT LARGE; CARRIERS; CORPORATIONS; PROCESS; SUBSCRIPTION OF STOCK.

### RECOGNIZANCE.

1. Complaint averring that *M.* and *P.*, on, &c., at *Greene* county, executed before *C.*, a justice of the peace, a recognizance, in the sum of 100 dollars, conditioned that *M.* should appear before said justice, at his office in said county, on, &c., to answer to "a charge of obtaining money by false pretense," and abide, &c.; that, by mistake, the venue of the recognizance was laid in *Sullivan* county, but that it sufficiently appeared from the papers that the obligation was for appearance in *Greene* county, which defendant well knew; that on, &c., the justice caused *M.* to be three times called, but he made default; that he caused *P.* to be called, who failed, &c.; and thereupon judgment of forfeiture was rendered, &c., which judgment is still in force, &c. Answers were filed, to which demurrers were sustained, and no exception taken.

*Held*, first, that the case stands as if no objection had been made to the sufficiency of the complaint in the Court below.

Second, that the complaint is sufficient to bar another suit for the same cause of action.

Third, that the recital in the recognizance, of the offense charged, is sufficient.

Fourth, that §§ 12, 13, 14, 2 B. S. p. 499, and § 49, *id.* p. 366, construed together, mean that a recognizance, to operate as a lien on lands, must be certified and recorded, &c.; but that it may be the foundation of an action, without having been so certified and recorded; that the action is in the nature of an action of debt, and is brought upon the recognizance as upon any other contract.—*Patterson v. The State et rel. Neff*, 86.

2. In an action upon a forfeited recognizance, a copy of the recognizance must be filed with



the complaint, and a forfeiture is necessary to the maintenance of the suit; but the statute (§ 78, 2 R. S. p. 44) does not require that the minutes of the Court showing the forfeiture, nor a copy thereof, should be filed with the complaint. The recognizance is a written instrument, within the meaning of the statute, while the judgment of forfeiture thereof is not.—*Votaw v. The State*, 497.

3. Complaint upon a forfeited recognizance. The substance of the second paragraph of the answer was, that the amount of the bail was not specified in, nor indorsed upon, the warrant of commitment. It did not deny that the amount had been fixed by the proper authority. Reply, showing that the amount of bail had been fixed by the order of the Court. *Held*, first, that the reply was good if the answer was good; that if the answer was good, it was because it is to be inferred from it that the amount of bail had not been fixed by competent authority; and the reply meets that inference.

Second, that if it could not be inferred from the facts set up in the answer, that the amount of bail had not been fixed by competent authority, then the facts were wholly immaterial, and an issue upon them would have been immaterial.

Third, that it is not error to refuse to reject a reply to an immaterial answer, although the reply may not be responsive to it.

Fourth, where the amount of bail has been properly fixed, a recognizance is not void because the amount is not indorsed upon the warrant of commitment.—*Ibid*.

4. If in an action upon a forfeited recognizance, the answer admits the execution of the recognizance, its admission in evidence is not an error of which the defendant can complain.—*Ibid*.

5. Action upon a forfeited recognizance. The state offered in evidence the following order made by the Court at the time the indictment was found: "Ordered, that on all bills of indictment returned by the grand jury at the present term of this Court for perjury, the defendant is required to enter into recognizance in the sum of 500 dollars, with surety in the like sum; for 'passingn' of counterfeit apparatus, in the sum of 1,000 dollars, with surety in the like sum; for aiding in the possession of counterfeiting apparatus, forgery, and grand larceny, all in the sum of 500 dollars," &c. Parol testimony was offered to show that "passingn" was intended for the word "possession," and the record was amended accordingly. Parol testimony was received that the order was intended to embrace the cause in which the recognizance was taken.

*Held*, first, that the order was sufficient to sustain a finding against the defendant, independently of the parol testimony.

Second, that the order was made in compliance with § 30, 2 R. S. p. 356, and sufficiently fixes the amount of bail in the present case.

Third, that the words "passingn of counterfeit apparatus," sufficiently indicated the crime for which the indictment was found, and authorized the sheriff to take the recognizance; and the recognizance having been taken subsequently to the making of the order, no proof was necessary to show that the particular case was intended to be embraced in the order. WORDEN, J., dissented.—*Ibid*.

See SHERIFF, 1, 2, 3.

#### RECORD ON APPEAL.

See PRACTICE, 3, 4.

#### REFERENCE.

1. An objection to the rendition of judgment upon a report of referees, not based upon anything before the Court, may be disregarded.—*The Board of Trustees, &c. v. Huston*, 276.



2. If referees err upon any question of practice during the hearing, objection must be made then and there, and incorporated in either a bill of exceptions or a statement of the referees in their report.—*Ibid.*
3. Referees may be required to report the facts found; but that requirement does not extend to the evidence by which those facts are proved; and it is ground for rejecting the report, if they report the evidence instead of the facts proved. The rule as to special verdicts applies to special reports of referees—*Ibid.*
4. A referee, acting under a reference to him of the matters in issue in a pending suit, has no right to report the evidence given before him, though he may report the facts proved by it, if authorized to do so by the parties.—*Ware v. Adams*, 359.
5. The authorities upon this point are based upon the assumption that, under the statute there is but one way of bringing the facts before the Court, viz., by requiring the referee to report the facts found and the conclusions of law, separately; and then, upon exception, the Court will review the decision of the referee as it would its own proceedings on a motion for a new trial.—*Ibid.*

#### REHEARING.

1. Under the fourth rule of this Court (4 Ind. R. vii.), a rehearing granted upon a petition, asking for such rehearing as to certain points, or a portion, only, of those decided in a cause, limits a re-examination to the points decided and included in such petition.—*Gatling v. Newell et al.*, 116.
2. And if the opposite party should desire a rehearing of any other points, he should petition for it.—*Id.* 118.

#### RENTS.

See EXECUTORS AND ADMINISTRATORS, 7; SHERIFF'S SALE, 3.

#### REPLEVIN.

Complaint against *A.* and *B.* for unlawfully taking and detaining personal property. The property was delivered to the plaintiff upon his giving an undertaking, &c. Answers, 1. In denial. 2. By *A.*, property in a stranger. 3. By *B.*, property in himself. Trial by jury; verdict as follows: "We the jury, find for the defendants."  
*Held*, first, that the verdict being general, embracing all the issues, it finds the property to be in *B.* and also in a stranger, and hence, is inconsistent with itself, and bad.  
 Second, that the verdict did not authorize a judgment for a return of the property, because it did not determine the value of the property.  
 Third, that the verdict amounts to nothing more than a finding for the defendants on their denial of having taken the property; and that, in this view, the objection for inconsistency is obviated, and the verdict may stand, if the defendants see proper so to treat it.—*Tardy v. Howard et al.*, 404.

See PLEADING, 4.

#### REPRESENTATIONS.

See CONTRACT, 1, 2.

#### RETURN.

Where the sheriff's return to a summons is subscribed by his deputy, who does not use the name of his principal at all, but the record shows that the sheriff in person amended the return in open Court, and the defendant, without objecting to the return for that cause, en-



## SLANDER.

1. In an action for slander, the Court may, in its discretion, after the jury is impaneled, permit the plaintiff to amend his complaint, by inserting a new set of words; or by striking out part of a set of the words originally charged therein, to have been spoken.—*Lister v. McNeal et ux.*, 302.
2. Where slanderous words are uttered in a foreign language, the complaint should set out the words in that language, with a translation.—*Kerschbaugher v. Slusser*, 453.
3. If slanderous words are charged to have been spoken in the *English* language, there will be a variance if the proof show that they were spoken in another language. The code has not changed the rule.—*Ibid.*
4. Words charging that *A.* had had illicit carnal intercourse with his daughter, naming her, are not slanderous without the further averment that *A.* had knowledge of the relationship.—*Griggs v. Vickroy*, 549.

## STATUTES.

Section 216, ch. 40, R. S. 1843, declaring that any pleading denying or requiring proof of the execution or assignment of any instrument of writing which is the foundation of the suit, and is specially set forth in the declaration, shall not impose the necessity of such proof, unless verified by oath, is continued in force by § 802, 2 R. S. p. 224.—*Patterson v. Crawford*, 241.

See ANIMALS RUNNING AT LARGE; APPEAL, 4; BANKS AND BANKING, 3; BILL OF EXCHANGE, 5; CONSTITUTIONAL LAW; DAMAGES, 4; DELIVERY-BOND, 2; DOWER, 4, 5, 6; EXECUTION, 1, 2, 3; EXECUTORS AND ADMINISTRATORS, 11; HIGHWAYS, 1; INTERROGATORIES; JUDGMENT, 3, 4; JUDGMENT BY DEFAULT, 2; JUSTICE OF THE PEACE, 1; PLEADING, 15, 19; PRACTICE, 21, 27 to 30; PUBLICATION, 1; RAILROAD COMPANY, 1 to 6; RECOGNIZANCE, 2; SALE, 3, 5; WAGER, 1.

*Of Foreign State.]*

See EVIDENCE, 6.

## STOCK.

See CORPORATIONS; SUBSCRIPTION OF STOCK.

## STREETS.

Complaint alleging that on, &c., at, &c., the defendant wrongfully, &c., laid a pile of dirt and gravel in *East* street between *Washington* and *Market* streets, in the city of *Indianapolis*, &c., which said *East* street was then and there a public highway, &c., and the plaintiff, in carelessly driving along said street, between the streets aforesaid, and being then and there ignorant of the existence of said pile of dirt and gravel, the evening being dark, ran against and upon the same, whereby his gray mare, of the value, &c., was then and there thrown down and fatally injured, so as to render her wholly worthless, and the shafts of his buggy broken, and his harness ruined; and that by reason of the pile of dirt and gravel so laid up, &c., he has suffered damage to the amount of 500 dollars; wherefore, &c. Answer, 1. By a general denial. 2. That the defendant did not wrongfully, &c., lay a pile of dirt and gravel in *East* street; but alleges the truth to be that, on, &c., at, &c., the defendant being about to build and engaged in building a house, on lot, &c., bordering on said street, did deposit in said street, near to said building being erected, materials for such building, for a reasonable time and not longer, to-wit, a lot of sand, which is the same "pile of dirt and gravel" complained of. The defendant says he left ample space in said street, to-wit, fifty feet, around said sand, for the passage of all traveling that way, and for wagons, buggies, &c. Wherefore, if any harm came to the plaintiff's buggy, &c., it was the fault of the plaintiff, &c. 3. The same as the second, adding that at, &c., aforesaid, there was an ordi-



nance of the city of *Indianapolis*, passed *April 20, 1852*, and afterwards continued in force, whereby "persons engaged in building or making pavement, may deposit materials, &c., in any of the streets or alleys for a reasonable time; but no person shall be authorized to fill up any gutter or channel for the passage of water, or so obstruct the said street or alley as to prevent the passage of carriages, nor occupy more than one-third of such street or alley." And the defendant says that he did not fill up any gutter, &c., nor so obstruct said street as to prevent the passage of carriages, nor did he occupy more than one-third of said street; and he left open, unoccupied, and unobstructed, a large space of and upon said street, around said pile, to-wit, sixty feet, along and through which the plaintiff might have safely driven his mare, &c. 4. That the defendant deposited the same, as alleged in the second and third paragraphs, and for the purpose therein named, which is the same pile complained of, as he had a right to do; that the same had not remained there an unreasonable length of time; and the plaintiff, well knowing that said materials were there, carelessly drove his mare and buggy upon said sand, and the mare being old and clumsy, fell and slightly injured the shafts of the buggy, doing no damage to the harness. Demurrer to the second, third, and fourth paragraphs sustained.

*Held*, first, that, as a general rule, a person who, without fault or negligence on his own part, receives a bodily hurt, or suffers damage to his horse or carriage, in consequence of a direct collision with an obstruction in the highway, is specially damnified, and may maintain an action against the author of the obstruction.

Second, that a street of a city may be obstructed by placing material for building, &c., in it, for a reasonable time, in a manner likely to occasion the least inconvenience to the public, if from want of room for such material elsewhere, it be necessary to deposit it in the street.

Third, that the second paragraph of the answer was bad for not showing a reasonable necessity for placing the building materials upon the street; that the Court cannot infer such necessity from the fact that the building was being erected in a populous and thriving city.

Fourth, that the ordinance pleaded was continued in force by § 84 of the general act of 1852, for the incorporation of cities; that the ordinance is not inconsistent with the provisions of that act, but on the contrary it falls expressly within § 57 thereof, which confers upon the common council plenary power over the streets, &c.; that the ordinance cannot be construed as merely protecting the party depositing an obstruction in the street, from prosecution by the city—it protects him likewise from actions brought by other persons.

Fifth, that the common council have exclusive power over the streets, &c., and have the right to determine to what uses they shall be applied, and under what circumstances and to what extent they may be encumbered.

Sixth, that the fourth paragraph of the answer is good.—*Wood v. Mears*, 515.

### SUBSCRIPTION OF STOCK.

1. An order of the board of directors of a railroad company, assessing the subscriptions of stock, certified by the secretary of the company, though not authenticated as the statute requires, is admissible in evidence in a suit upon a subscription, if no objection be made (and if no ground of objection was pointed out in the Court below, the case stands in the Supreme Court as if none was made); and when so admitted it is as conclusive of the matters contained in it, as if it had been properly authenticated.—*Smith v. The Indiana, &c., Railway Co.*, 61.

2. In a suit upon a subscription of stock, to recover installments regularly assessed in accordance with the terms of the subscription, the subscriber is not entitled to notice of the assessment, or the time and place of payment, before suit brought.—*Ibid*.

3. The contract to pay by installments is, in such cases, a promise to pay on demand; and the demand involved in the commencement of the suit is alone sufficient.—*Ibid*.



4. It cannot be pleaded to a complaint upon a subscription of stock, that at the time it was made there was no such corporation, because the defendant is estopped by his contract to deny the corporation, and because, under the general railroad law, subscriptions of a certain amount of stock are necessary for the organization of a contemplated corporation, and for that reason and purpose are valid before such organization, and may be collected afterwards.—*Anderson v. The Newcastle, &c., Railroad Co.*, 376.
5. The defendant, in a suit upon a subscription of stock, cannot set up a secret, fraudulent arrangement by which other subscribers were to have stock upon terms different from those specified in the contract. Such arrangements are of no avail to the parties in whose behalf they are made.—*Ibid.*
6. Suit upon a subscription of stock reading as follows: "We, the undersigned, hereby severally subscribe the number of shares, of 50 dollars each, set opposite our names respectively, to the capital stock of the *Junction Railroad Company*, with which the *Ohio and Indianapolis Railroad Company* has been consolidated, payment of said stock to be made in such installments as shall be required by the board, not exceeding 10 per cent. every sixty days. May —, 1853. Names, *W. F. Gebhart*; shares, 20; amount, 1,000 dollars." The complaint did not aver that any installment of stock had been required by the directors. *Held*, bad on demurrer.—*Gebhart v. The Junction Railroad Co.*, 484.

See CORPORATIONS, 1, 2.

#### T.

#### TENDER.

See DAMAGES, 2.

#### TERMS OF COURT.

See PRACTICE, 19, 20, 21.

#### TRESPASS.

See EJECTMENT.

#### TRUSTS.

Where a grant of land was made to the use of the trustees of a certain church and their successors in office forever, in consideration of the respect of the grantor for the institution of Christianity, and that the church might have a suitable place for erecting a house of worship, upon a condition subsequent that a church should be erected upon the land within a reasonable time, and forever thereafter used as a house of worship, pursuant to the intention of the grantor, and after the church had been erected the property was sold, and converted to secular uses:

*Held*, first, that the trustees had no power to sell the land without the consent of the grantor, or his heirs, he being dead, and the members of the church.

Second, that the members of the church might have enjoined the transfer; and they might have had the conveyance set aside.

Third, that the misappropriation of the property granted was a breach of the condition which worked a forfeiture of the estate; and the grantor or his heirs could recover back the land in a suit at law or in equity.

Fourth, that condition broken gave right of entry.—*Scott v. Stipe et al.*, 74.

See DEED, 7; EXECUTORS AND ADMINISTRATORS, 4, 5.



## U.

## USURY.

See INTEREST.

## V.

## VARIANCE.

See *Doron v. Crosby*, 634; SLANDER, 3.

## VENDOR AND PURCHASER.

See LIEN; SALE; SHERIFF'S SALE.

## VENUE.

1. A second application for a change of venue will scarcely be granted upon the application of the same party.—*Nave v. Baird*, 318.
2. A motion for a change of venue in criminal actions is, under the statute, addressed to the sound discretion of the Court; and the Supreme Court will not reverse a judgment because such motion has been overruled by the Court below, unless an abuse of that discretion appear from the record.—*Griffith v. The State*, 548.

## VERDICT.

1. There is no error in permitting a discussion before the Court, in the presence of the jury, touching the proper form of their verdict.—*Ruffing et al. v. Tilton et al.*, 259.
2. The jury have a right to find a special verdict, unless otherwise directed by the Court.—*Ibid.*
3. A verdict is good if the Court can understand it, though it be informal; and if it be so uncertain that the Court cannot understand it, the jury must be sent back with proper instructions as to the mode of framing it.—*Jones v. Julian*, 274.
4. Where the evidence is not in the record, a verdict, though informal, in stating conclusions of law without the facts upon which they rested, will be presumed to have been sustained by the evidence.—*Langedale v. Bonton*, 467.
5. Where the parties have submitted special interrogatories to the jury, one of which required a special finding upon all the issues, it is not error to refuse an instruction to the same effect.—*Ibid.*

See COUNTER-CLAIM; REFERENCE, 3; REPLEVIN.

## VOID AND VOIDABLE.

See INFANCY, 1; INTEREST; SHERIFF'S SALE, 1.

## VOLUNTARY ASSIGNMENTS.

4. placed notes on different persons, amounting in the aggregate to the sum of 2,666 dollars, 35 cents, in the hands of *B.* to be applied by him in payment *pro rata* of certain debts of *A.*, amounting in all to 4,430 dollars, 67 cents, provided each creditor upon the receipt of his *pro rata* share of the proceeds of the notes, would release his entire claim against *A.*; but subject to express instructions to the effect that, if *C.*, who was responsible for 900 dollars, upon judgments against *A.*, should be compelled to pay that sum, then he should be reimbursed from the proceeds of the notes, before any part thereof should be applied upon



the other debts of *A.* The only written evidence of this arrangement was contained in the receipt given by *B.* to *A.* for the notes.

*Held*, first, that this arrangement did not divest *A.* of his property in the notes.

Second, that the arrangement, regarded as an assignment, was void; because it required each creditor, upon payment of his *pro rata* share of the proceeds of the notes, to release his entire debt.—*Butler et al. v. Jaffray et al.*, 504.

## W.

### WAGER.

1. A bet upon the result of an election, is within § 28, 2 R. S. p. 435.—*Hizer v. The State*, 330.

2. The contingency of a bet upon the result of an election, is determined when the popular vote is cast; though there may be difficulty in proving the result until it is officially determined in the manner prescribed by the constitution and laws.—*Ibid.*

3. *A.* and *B.* were contesting candidates for an office for which an election was to be held on the 14th of October, 1856. Prior to the election, *C.* offered to purchase a hat of *D.* to be paid for in case *A.* should be elected at the election to be held on that day, and not otherwise. *D.* offered to sell the hat to *C.* and wait with him for payment until *B.* should be defeated, and upon these terms *C.* purchased.

*Held*, first, that the parties had reference to the pending election.

Second, that the contract was a wager.—*Ibid.*

4. A sale of goods, to be paid for or not, according as an election may result, is as much within the reason and policy of the law, as any other form of bet or wager upon the result of an election.—*Ibid.*

5. The Courts take notice judicially of the accession of the chief executive of the confederacy or state. Thus, where at the time of the trial of an information against a person for betting upon the election of a certain candidate for governor, that candidate had entered upon the duties of the office, in pursuance to the election upon the result of which the bet was made, it was *held*, that no proof of his election was necessary.—*Ibid.*

### WAREHOUSEMAN.

See CARRIERS, 2, 3.

### WARRANT OF ATTORNEY.

1. Suit upon a bill of exchange. On the filing of the complaint, an attorney appeared for the defendants, and filed and proved a warrant of attorney, authorizing him to confess judgment against the defendants for the sum of 2,101 dollars, with interest from date, and costs. It did not describe the cause of action, but it did the parties to the suit. The judgment was rendered for the correct amount. *Held*, that it would have been better if the warrant of attorney had particularly described the cause of action, so that it might have plainly appeared that it was intended to be applied to the suit in which it was used; but the defendants cannot complain, as, if it was not intended for the suit in which it was used, there may be one judgment less against them, than otherwise might be.—*Conklin et al. v. Finnell et al.*, 394.

2. The bill of exchange set out in the complaint, contained a waiver of valuation laws. The warrant of attorney did not; but, *held*, that as it was to be applied to the cause of action described in the complaint, the judgment was properly rendered without benefit of appraisement laws.—*Ibid.*



WARRANTY.

1. In a complaint setting up a breach of a warranty of soundness, the breach stated must be coëxtensive with the contract of warranty. It may negative the words of the contract. The particular unsoundness need not be stated.—*Leeper v. Shawman*, 463.
2. More particularity is necessary in declaring on a special, conditional, or partial warranty, than on a general and absolute warranty.—*Ibid*.
3. *It seems*, that a breach of an affirmative character must be stated with more particularity than one of a negative character.—*Ibid*.

See PLEADING, 1.

WITNESS.

1. The cross-examination of a witness should be confined to the subject-matter of the original examination. If a party wishes to examine his opponent's witness touching new matter, he must call him afterwards as his own witness.—*Patton v. Hamilton*, 256.
2. A party may inform his witness of the testimony adduced by the opposite party, if the Court has not ordered witnesses not to converse with the parties; and if the record does not show such an order, the Supreme Court cannot presume that it was made.—*Horne et al. v. Williams*, 324.
3. Objections to particular testimony, though well taken, are no ground for the rejection of a witness altogether; and if a witness be rejected generally upon such objections, the error is sufficient to reverse the judgment; and it need not be shown that the witness was introduced to prove something pertinent to the issue.—*Ibid*.
4. A medical witness, in giving his opinion as an expert, cannot give the particulars of his practice not connected with the case; but if such testimony go to the jury without objection, testimony to contradict, or show the want of capacity and skill on the part of the witness, is not admissible. If such collateral matters be inquired of on cross-examination, the answers of the witness must be taken, and other witnesses cannot be called to contradict him.—*Ibid*.
5. A witness called as an expert, who had previously heard the testimony of another expert, was asked if he concurred in the opinion of the other, and if not, wherein he differed. Objection sustained. *Held*, that this was not error.—*Ibid*.
6. The rejection of a witness merely because he is a co-plaintiff, is error.—*Draper et al. v. Vanhorn et al.*, 352.
7. One of several co-plaintiffs is a proper witness to prove special damages to separate property of another co-plaintiff—the increase of the judgment that might be rendered on account of such damages, being necessarily in favor of the latter alone.—*Ibid*.
8. To refuse to permit a defendant to testify as a witness, on his own motion, is not error.—*Johnson v. Cox*, 362.

See ATTORNEY AND CLIENT, 3; CONTRACT, 9; PARTIES, 6; PLEADING, 8; PRACTICE, 10, 11, 24.

END OF VOL. XII.

Ex. G. A. A.



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